employee regularly worked only four days out of every five, however, the methodology of section 10(a) – if it were used – would inflate the employee's "average weekly wage" to a figure 25% above the actual earnings.[2]

Factual Background

Robert Castro claimed LHWCA compensation from petitioner General Construction Company and its insurance carrier, petitioner Liberty Northwest Insurance Company, for a November 20, 1998, right knee injury. Mr. Castro was ultimately awarded a 17% permanent partial disability rating of his right leg pursuant to LHWCA § 8(c)(2), 33 U.S.C. § 908(c)(2) (App. 91). During the 52 weeks immediately preceding his injury, Mr. Castro worked a total of 201.35 days (App. 6-7, 59, 76-77), *i.e.*, 77.4% of the available work days,[3] and earned a total of $40,466 (App. 59, 77), *i.e.*, an average of $778.19 per week.[4]

Beginning in September 1999, petitioners retained vocational rehabilitation consultants to conduct labor market surveys to determine whether suitable alternative employment was available to Mr. Castro. In one labor market survey, a consultant identified thirteen jobs that were available. Another vocational consultant performed additional labor market surveys and found another ten

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[2] To take a simple example, if an employee always worked four days per week and earned $200 each work day, section 10(a) would define the "average weekly wage" to be $1,000, which is 25% higher than the employee's actual earnings of $800 per week. For a more extreme example, *see infra* note 5.

[3] 201.35 ÷ 260 = 77.4%

[4] $40,466 ÷ 52 = $778.19

jobs that Mr. Castro could perform. The Administrative Law Judge ("ALJ") concluded that petitioners had shown suitable alternative employment through the identification of these 23 jobs and that Mr. Castro accordingly retained wage-earning capacity. App. 81. This factual finding was upheld by both the Benefits Review Board, App. 35, and the court of appeals, App. 7.

Almost a year after Mr. Castro's knee injury had reached a permanent state, the Department of Labor determined that Mr. Castro was a candidate for vocational retraining. The Department retained a vocational consultant who devised a plan, predicted to take two years, for Mr. Castro to be retrained in hotel/motel management at a local community college. The vocational consultant testified at a formal hearing that the internship program provided the opportunity to gain actual work experience to bridge the gap between study and work. Mr. Castro testified that as part of the vocational program, he was required to work 700 hours and, in fact, had obtained a paid internship with Marriott Hotels during the year prior to the formal hearing. He further testified that he had already worked over 80 hours at this job and was paid approximately $7.75 per hour.

Despite having an injury falling under the Act's schedule, despite being found employable by two consultants, and despite being required to work during the government-sponsored vocational rehabilitation, Mr. Castro sought total disability compensation during his rehabilitation program. Furthermore, Mr. Castro sought disability compensation based upon a calculation of his average weekly wage under LHWCA § 10(a), 33 U.S.C. § 910(a)

(App. 96), that was nearly 30% higher than his actual earnings.[5]

The Decisions Below

The ALJ found that Mr. Castro was entitled to total disability benefits during the period of his vocational retraining despite suffering from a scheduled injury and despite petitioners' showing of suitable alternative employment. Extending the Fifth Circuit's decision in *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994), to the context of a scheduled injury, the ALJ held that an employee who is otherwise employable is entitled to ongoing total disability benefits during the pendancy of a government-sponsored vocational rehabilitation plan.

The ALJ also followed the Ninth Circuit's decision in *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998), which had announced the bright-line rule that LHWCA § 10(a), 33 U.S.C. § 910(a) (App. 96), applies "when a claimant works more than 75% of the workdays of the measuring year," 154 F.3d at 1058. This application of section 10(a) made Mr. Castro's statutory "average weekly wage" almost 30% higher than his actual earnings. *See supra* note 5.

The Benefits Review Board, following *Abbott* and *Matulic*, affirmed. App. 32.

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[5] Mr. Castro's actual earnings averaged $778.19 per week. *See supra* note 4 and accompanying text. Under the ALJ's application of section 10(a), Mr. Castro's average daily wage of $200.87 ($40,466 ÷ 201.35; *see supra* notes 3-4 and accompanying text) produced a statutory – but entirely hypothetical – "average weekly wage" of $1004.37. App. 87. This represents a 29.1% increase over his actual earnings.

Petitioners appealed the Board's decision to the Ninth Circuit, which affirmed on both issues, App. 1, and denied a petition for rehearing, App. 89. The court of appeals agreed that *Abbott* should be extended to the present context despite the fact that Mr. Castro had suffered a scheduled injury. It sought to avoid the application of this Court's *PEPCO* decision by characterizing workers with scheduled permanent partial disabilities as "totally disabled" while engaged in vocational retraining (App. 12, 19-20), even though the court of appeals also accepted the ALJ's finding that Mr. Castro could return to work (App. 7), and thus could not have been totally disabled.

The Ninth Circuit also agreed that its prior decision in *Matulic*, along with its more recent decision in *Stevedoring Servs. of Am. v. Price*, 382 F.3d 878, 884-85 (9th Cir. 2004), required the application of LHWCA § 10(a), 33 U.S.C. § 910(a) (App. 96), because Mr. Castro had worked 77.4% of the available work days. App. 20-27. Although the court of appeals recognized "the virtual inevitability of overcompensation under § 10(a)," App. 24, this result was justified by its express desire to favor workers, App. 22-24.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's "bright-line 75% rule" is in acknowledged conflict with the rule applied by the Seventh Circuit and is inconsistent with the rule in other circuits

When Congress enacted the LHWCA, it provided three alternatives in section 10 for calculating an employee's pre-injury earning capacity. Section 10(a), 33 U.S.C. § 910(a) (App. 96), applies only if an injured employee worked "during substantially the whole of the year

immediately preceding his injury." But Congress made no attempt to provide any bright-line rule specifying more precisely when section 10(a) applies (although it would undoubtedly have been a simple matter to do so). Indeed, Congress did not define "substantially" even in general terms. The clear implication was that the ALJ should have the flexibility to decide each case on its particular facts. This is confirmed by the terms of section 10(c), 33 U.S.C. § 910(c) (App. 96), which applies "[i]f [the method of section 10(a)] cannot *reasonably* and *fairly* be applied." (Emphasis added.) Both in describing when section 10(a) applies and in describing when it does not, Congress chose broad language giving ALJs wide flexibility. Nothing could be further from Congress's approach (focusing as it does on "reasonabl[eness] and fair[ness]") than a bright-line rule requiring ALJs, as a matter of law, to apply section 10(a) in precisely defined circumstances without regard to whether it is reasonable or fair.

Notwithstanding the clear statutory language, the Ninth Circuit has firmly established what it describes as a "bright-line 75% rule." App. 27. A divided panel of the court first announced the rule seven years ago in *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998). Writing for the majority, Judge Reinhardt declared:

> [W]e conclude that when a claimant works more than 75% of the workdays of the measuring year the presumption that [section 10(a)] applies is not rebutted.

154 F.3d at 1058. In reaching this conclusion, the majority acknowledged that the Seventh Circuit applied a different rule and would have reached a different result. *See id.* at 1058 n.4 (citing *Strand v. Hansen Seaway Service*, 614 F.2d 572 (7th Cir. 1980)). But Judge Reinhardt tolerated

this conflict because "some 'overcompensation' is built into the system," *id.* at 1057, and the result was "supported by the humanitarian purposes of the LHWCA and by our mandate to construe broadly its provisions so as to favor claimants in the resolution of benefits cases," *id.*

Judge Reed argued in dissent that the majority's bright-line rule was "neither reasonable nor fair." *Id.* at 1061. First, it resulted in excess compensation when compared to the worker's actual employment record. In *Matulic*, the claimant had worked only 82% of the available work days but he was compensated as if he had worked them all. *See id.* Second, "the majority has consciously created an inter-Circuit conflict." *Id.* (citing *Strand*, 614 F.2d at 574). And third, section 10(a) did not accurately reflect the claimant's earning capacity because he had voluntarily failed to work the full year.

Two more recent decisions demonstrate that *Matulic*'s bright-line 75% rule is now firmly established in the Ninth Circuit. In *Stevedoring Servs. of Am. v. Price*, 382 F.3d 878 (9th Cir. 2004), the court noted that the claimant had "worked 75.77 percent of the measuring year." He therefore fell "near the line that *Matulic* drew but clearly within it." *Id.* at 884. And in the decision below, the panel similarly applied *Matulic* as established authority. *See* App. 23-26. In the process, the court once again acknowledged the conflict with the Seventh Circuit's decision in *Strand* and once again disagreed with its reasoning. *See* App. 25.

In deciding *Matulic* (and again in the decision below), the Ninth Circuit acknowledged its conflict with *Strand* and expressly rejected the Seventh Circuit's approach. The *Strand* court had held that a claimant who had worked

only 84% of the possible days in the preceding year could not benefit from section 10(a) but was instead subject to section 10(c).

The Ninth Circuit's bright-line 75% rule is also inconsistent with the approach taken in at least two other circuits. Less than a year ago, the Fifth Circuit expressly declined to follow *Matulic*. *See Gulf Best Elec., Inc. v. Methe*, 396 F.3d 601, 606 (5th Cir. 2004) ("this court has not adopted such a bright-line test for the applicability of [section 10(a)]"). And the Fourth Circuit long ago rejected the approach that *Matulic* would later take. In *Baltimore & O.R. Co. v. Clark*, 59 F.2d 595, 599 (4th Cir. 1932); the court explained that section 10(a) applies "only where the employment is of a continuous nature; for it is only in such cases that the multiplication of the average daily wage by [the number of work days in the year] would approximate the average annual earnings." Moreover, the court particularly warned against using a method that "would give as annual earnings a sum far in excess of the actual earning power of the employee." *Id*.

By departing from the Congressional scheme, which gave the ALJs the flexibility to decide each case on its own merits, and imposing a bright-line rule in a context in which no such rule is authorized,[6] the Ninth Circuit has substituted its judgment for Congress's and has imposed

[6] The Ninth Circuit complained that petitioners' arguments below "would appear to attack not only the line drawn in *Matulic* but also the drawing of a line at all." App. 24. This complaint both captures the fundamental nature of the Ninth Circuit's error and demonstrates that the panel entirely failed to appreciate it. When Congress has enacted a general standard giving ALJs the flexibility to decide each case on its particular facts, it is indeed a mistake to impose *any* bright-line rule that applies as a matter of law in every case.

burdens on employers that go far beyond what had been intended.

This departure has thrown confusion into a system where federal uniformity is of the utmost importance. Longshore employers and their respective carriers now face having to pay different benefits in different parts of the country. If there is to be such a bright-line test, it should properly come from Congress. If it is to be judicially created, this Court should be the one to announce it – thus ensuring the uniform application of the LHWCA.

II. Awarding total disability benefits during a period of vocational retraining when the injured employee would otherwise be limited to recovery under the Act's schedule is inconsistent with the plain language of the Act and this Court's decision in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980)

The plain language of LHWCA § 8, 33 U.S.C. § 908, distinguishes among four classifications of disability. *See also supra* at 4. Moreover, the appropriate compensation authorized for each classification is specifically defined. Section 8(a), for example, defines the compensation payable for permanent total disability, section 8(b) defines the compensation payable for temporary total disability, and section 8(e) defines the compensation payable for temporary partial disability. In all three cases, the compensation is calculated under a formula tied to the injured worker's lost wage-earning capacity.

Section 8(c), in contrast, defines the compensation payable for permanent partial disability in two ways. For the so-called "scheduled injuries," *see supra* at 4, section

8(c)(1)-(20) (App. 91-93) specifies a certain level of compensation – based on the injured worker's "average weekly wages" – for each type of injury. These awards do not depend on any actual decrease in the worker's earning capacity. Congress simply made the decision that a particular type of injury justified a particular level of compensation that might be higher or lower than the actual loss of wages in a particular case. For a permanent partial disability not falling under the schedule, on the other hand, section 8(c)(21) (App. 94) provides a formula that permits the injured worker to recover two-thirds of the lost wage-earning capacity.

The LHWCA's unique treatment of scheduled injuries creates an incentive for injured workers to attempt to recover compensation outside of the schedule whenever the schedule would limit their recovery to less than two-thirds of their lost wage-earning capacity. This Court addressed precisely such a case in *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268 (1980). The *PEPCO* claimant, much like Mr. Castro, suffered a permanent partial loss of the use of a leg, which is a scheduled injury covered by LHWCA § 8(c)(2) (App. [illegible]). Dissatisfied with the compensation authorized under section 8(c)(2), he sought compensation under section 8(c)(21) (App. 94) based on his lost wage-earning capacity. This Court resoundingly rejected that attempt in terms that are particularly relevant here.

PEPCO is relevant primarily for its holding that the benefits payable under section 8(c)(1)-(20) (App. 91-93) are exclusive for those who suffer permanent partial disability by reason of scheduled injuries. That holding should have been dispositive here. Mr. Castro clearly suffered a scheduled injury: a permanent partial loss of the use of a leg,

which is covered by LHWCA § 8(c)(2) (App. 91). This injury undeniably resulted in a permanent partial disability. The disability was found to be "permanent," *see* App. 91, and that finding has not been challenged. The disability is "partial" because Mr. Castro retains the ability to earn wages – a fact found by the ALJ, App. 81, and confirmed by the Benefits Review Board, App. 35, and the court of appeals, App. 7. *See also supra* at 6-7. Just as the *PEPCO* claimant was not allowed to avoid the schedule by relying on section 8(c)(21) (App. 94), so Mr. Castro should not be allowed to avoid the schedule by claiming a total disability (a claim that is in any event inconsistent with the finding that he retains the ability to earn wages).

PEPCO is also relevant for its analysis of the claimant's argument. The court of appeals in *PEPCO*, like the Ninth Circuit here, had relied heavily on the LHWCA's humanitarian objectives to justify awarding higher benefits to an injured worker. *See* 449 U.S. at 273; *cf.* App. 24. This Court responded:

> The LHWCA, like other workmen's compensation legislation, is indeed remedial in that it was intended to provide a certain recovery for employees who are injured on the job. It imposes liability without fault and precludes the assertion of various common-law defenses that had frequently resulted in the denial of any recovery for disabled laborers. While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. . . . It therefore is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered

> disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of the disabled laborers and their employers. The use of the schedule of fixed benefits as an exclusive remedy in certain cases is consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible.

449 U.S. at 281-82 (footnotes omitted). The Court concluded: "sympathy is an insufficient basis for approving a recovery that Congress has not authorized." *Id.* at 284.

The Ninth Circuit, seeking to avoid *PEPCO*, purported to distinguish that case on the ground that it addressed only "permanent *partial* disability benefits" while Mr. Castro was entitled to "benefits for *total* disability" because of his vocational retraining. App. 12 (emphasis in original). But that is a conclusory assertion unfounded on the facts. All three of the decisions below recognize that Mr. Castro retains the ability to work. *See* App. 7, 35, 81. He has no "incapacity because of injury to earn . . . wages." LHWCA § 2(10), 33 U.S.C. § 902(10) (defining "disability"). Any incapacity to earn wages is not "because of injury" but because of his desire to engage in vocational retraining. This case therefore has little to do with total disability except to the extent that the Ninth Circuit chose to declare a rule whereby an employee with a permanent partial disability in fact is treated as having a total disability during vocational retraining. But there is no more justification for avoiding the limits of the schedule by this device than there was to avoid those limits in *PEPCO* through section 8(c)(21) (App. 94).

Rather than applying this Court's teachings from *PEPCO*, the Ninth Circuit chose to follow and extend the Fifth Circuit's decision in *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994). *See also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 315 F.3d 286 (4th Cir. 2002) ("*Brickhouse*"). To the extent that *Abbott* and *Brickhouse* create a legal rule whereby a worker with the factual capacity to earn wages is nevertheless treated as totally disabled in order to secure more compensation for an injured worker, these decisions are at least questionable. As they form the lynchpin for the Ninth Circuit's ruling here, this case could provide a suitable vehicle to review that rule. But even if *Abbott* and *Brickhouse* were correctly decided, they do not justify the Ninth Circuit's departure from *PEPCO*. Neither *Abbott* nor *Brickhouse* involved a scheduled injury and thus neither raises the *PEPCO* concerns. The decision below is inconsistent with *PEPCO* whether or not *Abbott* and *Brickhouse* were correctly decided.

On this issue, as well, the Ninth Circuit has ignored the clear intent of Congress in order to reach a result motivated by sympathy rather than a proper application of the LHWCA. This Court should grant review to enforce the doctrine that it recognized in *PEPCO*, restore the statutory meaning that Congress intended, and protect the legitimate interests of both workers and employers.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

RAYMOND H. WARNS, JR.
Counsel of Record
ROBERT J. BURKE, JR.
HOLMES WEDDLE & BARCOTT
999 Third Ave., Suite 2600
Seattle, WA 98104
(206) 292-8008

MICHAEL F. STURLEY
727 East Dean Keeton St.
Austin, TX 78705
(512) 232-1350

APPENDIX
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENERAL CONSTRUCTION COMPANY; LIBERTY NORTHWEST INSURANCE CORP.,

Petitioners,

v.

ROBERT CASTRO; DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,

Respondents.

No. 03-72528

OWCP No. 14-129-450
BRB No. 02-0783

OPINION

Petition for Review of an Order of the
Benefits Review Board

Argued and Submitted
December 10, 2004 – Portland, Oregon

Filed March 2, 2005

Before: Thomas G. Nelson and Johnnie B. Rawlinson, Circuit Judges, and William W Schwarzer,*
Senior District Judge

Opinion by Judge Schwarzer

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

Raymond H. Warns, Jr., Holmes Weddle & Barcott, Seattle, Washington, for the petitioners.

William D. Hochberg and Nicole A. Hanousek, Law Office of William D. Hochberg, Edmonds, Washington, for respondent Robert Castro.

Peter B. Silvain, Jr., Attorney, U.S. Department of Labor, Washington, D.C., for respondent Director, OWCP.

Roger A. Levy, Laughlin, Falbo, Levy & Moresi LLP, San Francisco, California, for amicus curiae Longshore Claims Association.

OPINION

SCHWARZER, Senior District Judge:

General Construction Co. and Liberty Northwest Insurance Corp. (General Construction), with amicus Longshore Claims Association (LCA), petition for review of the determination of the Benefits Review Board (BRB) that claimant Robert Castro is entitled to total disability compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994) (LHWCA), during his period of participation in a vocational rehabilitation program approved by the Office of Workers' Compensation Programs (OWCP). General Construction also claims that the method the administrative law judge (ALJ) used to calculate Castro's average weekly wage was incorrect and that the OWCP violated General Construction's procedural rights under the Administrative Procedure Act (APA) and the Due Process Clause of the federal Constitution.

We deny the petition for review. The BRB appropriately affirmed the ALJ's award under the LHWCA, and the ALJ's wage calculation was correct under Ninth Circuit law. The BRB also correctly concluded that the OWCP's failure to grant General Construction a hearing before approving Castro's rehabilitation program did not violate General Construction's procedural or due process rights.

STANDARD OF REVIEW

Under the LHWCA, we review BRB decisions "for errors of law and for adherence to the substantial evidence standard." *See Alcala v. Dir., OWCP*, 141 F.3d 942, 944 (9th Cir. 1998). The BRB must accept the ALJ's factual findings if they are supported by substantial evidence. 33 U.S.C. § 921(b)(3); *see also Lockheed Shipbuilding v. Dir., OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). "Like the [BRB], this court cannot substitute its views for the ALJ's views." *Container Stevedoring Co. v. Dir., OWCP*, 935 F.2d 1544, 1546 (9th Cir. 1991).

On questions of law, including interpretations of the LHWCA, we exercise de novo review. *Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 1261 (9th Cir. 2001). We need not defer to the BRB's construction of the LHWCA, but we "must . . . respect the [BRB's] interpretation of the statute where such interpretation is reasonable and reflects the policy underlying the statute." *Id.* (quoting *McDonald v. Dir., OWCP*, 897 F.2d 1510, 1512 (9th Cir. 1990)). We also "accord considerable weight to the construction of the statute urged by the Director of the [OWCP] as [s]he is charged with administering" the LHWCA. *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 696

(9th Cir. 2002) (quoting *Force v. Dir., OWCP*, 938 F.2d 981, 983 (9th Cir. 1991) (internal quotation marks omitted)). "We will defer to the Director's view unless it constitutes an unreasonable reading of the statute or is contrary to legislative intent." *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984)).

BACKGROUND

I. CASTRO'S EMPLOYMENT, INJURY, AND REHABILITATION PROGRAM

Claimant Robert Castro worked as a carpenter and pile driver from 1973 until he was disabled due to his injury in 1998. He began work as a pile driver for General Construction in 1998. On November 20, 1998, Castro slipped and fell on a crane step, tearing the anterior cruciate ligament in his right knee. After three surgeries, Castro was released to return to light duty work in August 2000. Castro attempted to return to work at General Construction, but the job he took, cutting metal plates with a torch while seated, was too strenuous, and his physician, Dr. Mandt, determined that it was beyond Castro's ability. No other light duty work being available at General Construction, Mandt recommended vocational retraining.

General Construction conducted labor market studies, which identified jobs the counselors believed Castro could perform, such as courier, cashier, and security officer. The starting wages for these jobs ranged between $8.00 and $10.00 per hour, or between $16,640 and $20,800 per year, but with experience, some could pay up to $25,000 per year. Castro testified that he investigated at least some of these jobs, but found that they were taken. Castro did not

investigate other jobs because after commuting costs they would have paid around $2.00 per hour.

OWCP referred Castro to vocational rehabilitation counselor Carol Williams to develop a rehabilitation plan. She and Castro decided on hotel management by a "process of elimination." As part of his vocational rehabilitation plan, approved by OWCP sometime prior to August 1999 and initiated in August 1999, Castro enrolled in a hotel tourism program at a local college. He was scheduled to take classes from September 13, 2000, through June 7, 2002. Evidence suggested that after completing the program, Castro could expect to earn around $16,000 initially and to progress, with experience, to approximately $27,580 per year, or to as much as $40,000 per year as manager at a larger hotel.[1]

Williams disagreed with General Construction's labor-market survey, claiming that the positions identified would be difficult for Castro because of his physical limitations, which included limits on his manual dexterity due to a previous hand surgery. Williams also took the position that Castro would have "a great deal of difficulty" going to school and working at the same time. Castro spent between forty-six and fifty-four hours per week on his vocational program. His commute to school took anywhere from one and one-half to two and one-quarter hours. He spent fifteen to eighteen hours per week in class and another twenty-five hours per week in study and preparation for

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[1] In August 2000, sometime after it learned of Castro's rehabilitation plan, General Construction sent a letter to the OWCP disputing the plan and requesting that the District Director transfer the dispute to an ALJ for a hearing. The record does not indicate that the OWCP responded to or acted on this letter.

class. While in school, Castro worked briefly in a paid internship, but after working about eighty hours he had to resign due to his vocational program's demands and requirements.

When Williams retired at the end of 2000, Castro began to see a new vocational consultant, Stan Owings. Owings concluded that Castro was limited to sedentary jobs or those requiring only light physical exertion, and stated that some of the jobs General Construction identified are "reasonable examples of jobs and wages currently available to" Castro. Owings also recognized that Castro "may return to work with or without completing the education curriculum in which he is currently enrolled." As of the dates of the hearing before the ALJ, June 20, 2001, and the ALJ's decision, May 8, 2002, Castro had not completed his schooling.

Castro earned $38,422.57 in 1995, $38,571.33 in 1996, $39,648.34 in 1997, and $39,717.62 in 1998, the year of his injury. General Construction initially paid compensation to Castro based on an average weekly wage of $988.62. On July 3, 2000, however, General Construction reduced this payment to one based on a $500 weekly wage, stating that Castro had not produced requested evidence, including earning statements from prior employment supplementing the $9886.18 he earned at General Construction in the year prior to his injury. On July 11, 2000, General Construction reinstated Castro's compensation based on a recalculated average weekly wage of $756.65. Castro argued that his weekly wage should be $1006.60 and, in support of his motion for partial summary judgment, submitted a declaration stating that during the fifty-two weeks before his accident, he worked a total of 201.35

days. The wage records Castro submitted indicate that in most of the weeks he worked, he worked for forty hours.

II. CASTRO'S LHWCA CLAIM

Castro filed a claim with the OWCP in November of 1998, seeking permanent partial disability benefits under the LHWCA's schedule for a 35% impairment to his right knee and seeking temporary and permanent total disability benefits for the period he was enrolled in the vocational rehabilitation program.

In May 2002, following a formal hearing, the ALJ issued a decision finding Castro's scheduled disability rating to be 17% and awarding Castro permanent partial disability benefits on the basis of his knee injury for a period of 48.96 weeks (17% of the statutory 288 weeks), pursuant to 33 U.S.C. § 908(c)(2), (19).[2] On the issue of Castro's claim for total disability benefits, the ALJ determined that Castro had met his burden of demonstrating inability to return to his usual work (and thus total disability, permitting compensation additional to that for his scheduled injury) but also that General Construction had established the availability of some suitable alternate employment. Nevertheless, the ALJ found that because Castro was enrolled in a vocational rehabilitation program and had shown that completion of the program both precluded employment and gave him the best long-term earning potential, he was entitled to total disability benefits for the duration of the program, under *Louisiana*

[2] This 2002 hearing on Castro's claim for benefits thus followed OWCP's 1999 approval of Castro's vocational rehabilitation program by several years.

Insurance Guaranty Ass'n v. Abbott, 40 F.3d 122, 127-28 (5th Cir. 1994).[3]

With respect to the calculation of Castro's award, the ALJ rejected General Construction's assertion that § 10(c) of the LHWCA, 33 U.S.C. § 910(c), should govern, applying instead § 10(a), 33 U.S.C. § 910(a), in accordance with our holding in *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998).[4]

General Construction appealed the ALJ's decision to the BRB, which affirmed the award. The BRB, like the ALJ, found *Abbott* to be controlling and noted that since the ALJ had issued the decision in Castro's case the Fourth Circuit had also followed *Abbott*. *Newport News Shipbuilding & Dry Dock Co. v. Dir., OWCP*, 315 F.3d 286, 295 (4th Cir. 2002). The BRB also upheld the ALJ's use of § 10(a) to calculate Castro's average weekly wage, relying, like the ALJ, on *Matulic*. Finally, the BRB rejected General Construction's claim that the OWCP had violated its procedural rights by refusing to afford it a hearing before an ALJ on the question of the appropriateness of vocational rehabilitation in Castro's case. The BRB noted that the Ninth Circuit has held that neither the LHWCA nor any other authority guarantees employers or insurers a

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[3] The ALJ acknowledged that *Abbott* does not establish an unqualified entitlement to benefits during vocational rehabilitation but concluded that Castro's situation did not differ from that of the claimant in *Abbott* in any material respects.

[4] Section 10(a) of the LHWCA provides the presumptive method for calculating wages. Section 10(c) is used only when § 10(a) cannot be "reasonably and fairly" applied. 33 U.S.C. §§ 910(a)-(c); *see also Matulic*, 154 F.3d at 1056. Under § 10(a), the ALJ calculated Castro's total disability benefits as $669.58 per week, based on an average weekly wage of $1004.37.

hearing before an ALJ on all disputes. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 1093-95 (9th Cir. 2000). ALJs specifically lack jurisdiction to adjudicate disputes over matters committed to the OWCP Director's discretion. *Id.* at 1095. The BRB concluded that the relevant statutory and regulatory provisions committed the design and approval of vocational rehabilitation plans to the discretion of the Director. Since General Construction was not entitled to a hearing before an ALJ on this issue, the OWCP did not violate General Construction's procedural rights when the OWCP declined to order such a hearing.

General Construction timely appealed all three issues: (1) the applicability of *Abbott* to the present case; (2) the applicability of § 10(c) to the present case; and (3) denial of General Construction's procedural rights.

DISCUSSION

I. LEGAL FRAMEWORK

The LHWCA's compensation scheme distinguishes between injury, which is a physical impairment, "occupational disease[,] or infection," 33 U.S.C. § 902(2), and disability, which the LHWCA defines as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment," *id.* § 902(10). The statutory scheme also provides for four broad classes of benefits, distinguished according to the duration of the underlying injury (permanent or temporary) and the nature or degree of disability (partial or total). *Id.* § 908; *Stevens v. Dir., OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990); *Abbott*, 40 F.3d at 125-28.

A disability is temporary "so long as there [is] a possibility or likelihood of improvement through normal and natural healing." *Stevens*, 909 F.2d at 1259 (citation omitted). After a claimant is shown to have attained "maximum medical improvement," however, the remaining disability is classified as permanent. *Id.* at 1258. A disability may be classified as permanent and benefits paid under the LHWCA's provisions for permanent disability for a finite period. *See* 33 U.S.C. §§ 908(a) (providing that permanent total disability benefits pay 66⅔% of the employee's average weekly wage for the duration of the disability); 908(c), 908(c)(21) (providing that permanent partial disability benefits pay 66⅔% of the employee's average weekly wage for a length of time determined by schedule or "during the continuance of disability").

A disability is classified as total when (1) a claimant demonstrates that the work-related injury in question renders him unable to return to prior employment, and (2) the employer subsequently fails to establish the availability of suitable alternative employment within the geographic area of the claimant's residence, which the claimant can perform considering the claimant's limitations, age, education, and background, and with a diligent employment search on the claimant's part. *See Bumble Bee Seafoods v. Dir., OWCP*, 629 F.2d 1327, 1329-30 (9th Cir. 1980); *Stevens*, 909 F.2d at 1258.[5] Disabilities not precluding suitable alternative employment are classified as partial. *Stevens*, 909 F.2d at 1258. In other words, in

[5] The LHWCA also provides that a disability is classified as total if the underlying injury involves "[l]oss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof." 33 U.S.C. § 908(a).

general, if the claimant is capable of engaging in some gainful work, the disability is partial. *Id.*

Two circuits, the Fifth and the Fourth, have added another element to this basic test for distinguishing between total and partial disability. Under their precedent, a claimant who is enrolled in a vocational rehabilitation program and can demonstrate that the program entirely precludes him from engaging in otherwise suitable employment may receive total disability benefits for the duration of the program. *Abbott*, 40 F.3d at 127; *Newport News*, 315 F.3d at 295. In *Abbott*, an opinion by retired U.S. Supreme Court Justice Byron White, the Fifth Circuit reasoned that although the Act does not explicitly provide for total disability during rehabilitation training, such an interpretation is consistent with "the Act's goal of promoting the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force." *Abbott*, 40 F.3d at 127 (citation omitted). The validity of this standard in the Ninth Circuit is one of the issues in the present case.

Benefits for total disability, whether temporary or permanent, are calculated on the basis of the claimant's "average weekly wages" and awarded for the "continuance" of the disability. 33 U.S.C. §§ 908(a), (b). Benefits for partial disability, whether temporary or permanent, are awarded according to one of two statutory schemes. *See Potomac Elec. Power Co. v. Dir., OWCP* (*Pepco*), 449 U.S. 268, 270-71 & n.1 (1980); 33 U.S.C. §§ 908(c), 908(c)(21). For particular statutorily enumerated, or "scheduled," injuries, the LHWCA sets forth formulas for calculation of benefits. 33 U.S.C. § 908(c). For injuries that do not fall into any of the scheduled categories, benefits for partial

disability are awarded on the basis of the claimant's reduction in earning capacity resulting from the injury. *Id.* § 908(c)(21). These remedies are exclusive; a claimant with a scheduled injury may not elect earning-capacity-based benefits. *Pepco*, 449 U.S. at 273-80. However, under the statutory scheme the distinction between scheduled and unscheduled injuries is pertinent only to the calculation of permanent *partial* disability benefits; the distinction has no bearing on benefits for *total* disability. *See* 33 U.S.C. § 908(c) (setting forth schedule formulas for calculating "[p]ermanent partial disability"); *see also Brown v. Nat'l Steel & Shipbuilding Co.*, 34 Ben. Rev. Bd. Serv. (MB) 195, 198 (2001); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 Ben. Rev. Bd. Serv. (MB) 264, 265-66 (1998).

All of the above calculations require an initial determination of the claimant's "average weekly wage at the time of the injury." *See* 33 U.S.C. § 910. Three different formulas for determination of this amount are set forth at 33 U.S.C. §§ 910(a)-(c). The selection of the proper formula in Castro's case is also at issue in this appeal.

II. CASTRO'S ENTITLEMENT TO TOTAL DISABILITY DURING VOCATIONAL REHABILITATION

The ALJ in the present case found *Abbott* applicable to Castro's case and held that Castro was entitled to total disability benefits for the period during which he was enrolled in his vocational rehabilitation program. On appeal, General Construction argues (1) that *Abbott* was wrongly decided and should not be applied to this case and (2) that even if *Abbott* was correct on its facts, Castro's case is distinguishable. We address these arguments in turn.

A. Abbott Is Consistent with the LHWCA's Text and Purpose

The interpretation of the LHWCA found in *Abbott* and *Newport News* and adopted by the OWCP Director in this case is supported by the language of the LHWCA and its purpose.

The LHWCA does not specifically provide that total disability benefits are to be awarded where a claimant shows that participation in a rehabilitation program precludes acceptance of alternative employment. But the statute's silence is not determinative. In fact, the statute is generally silent on the scope and definition of "total disability." *See* 33 U.S.C. § 908(a) (providing that where claimant has not lost two major body parts, the existence of "total disability shall be determined in accordance with the facts"). As the Fifth Circuit noted in *Abbott*, the statute leaves it to the courts to "enunciate standards for distinguishing between the various categories" of disability – total and partial as well as permanent and temporary. 40 F.3d at 125-26.

The *Abbott* rule is consistent with the language and a principal policy of the LHWCA: the encouragement of vocational rehabilitation. The LHWCA specifically provides that "[t]he Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange . . . for such rehabilitation." 33 U.S.C. § 939(c)(2). Moreover, the LHWCA defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Thus, the LHWCA speaks of disability in terms of economic harm, not just physical harm. *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 126-27 (1997). The *Abbott* rule, consistently with

this definition, simply clarifies that it is possible for a claimant to be entitled to benefits for "total disability" when the claimant is physically capable of performing certain work but unable to secure that work for some other reason. *See Abbott*, 40 F.3d at 127; *see also Newport News*, 315 F.3d at 295.

Amicus LCA argues that *Abbott* was wrongly decided because in 1984 Congress considered and failed to pass amendments to the LHWCA creating a statutory entitlement to total disability for all claimants during vocational rehabilitation training. We note at the outset that congressional inaction is not a reliable guide to legislative intent. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.") (internal quotations and citations omitted); *United States v. Wise*, 370 U.S. 405, 411 (1962). Moreover, the failed amendments in this case would have been more sweeping than *Abbott's* rule, since they would have created an entitlement to disability benefits during rehabilitation. H.R. 7610, 96th Cong., 2d Sess. at 19-20 (1980) (providing that "[a]n employee who as a result of injury is undergoing vocational rehabilitation . . . shall be entitled to receive continued temporary total or partial compensation during . . . such rehabilitation").[6] In contrast, the *Abbott* rule

[6] *See also* H.R. Rep. No. 98-570, pt. I, at 83 (1983) (including comments from sponsor of H.R. 7610 (1980) noting that compromises on LHWCA amendments included the elimination of "amendments concerning vocational rehabilitation which assured continued payment of benefits during rehabilitation").

requires a fact-finder to consider on a case-by-case basis an injured worker's participation in a rehabilitation program as one factor in determining whether suitable alternative employment is available to that worker. *Cf. Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 Ben. Rev. Bd. Serv. (MB) 221 (2000) (applying *Abbott* and denying temporary total disability benefits when claimant failed to show that enrollment in rehabilitation program precluded acceptance of alternate employment); *Gregory*, 32 Ben. Rev. Bd. Serv. (MB) 264 (same). Congress's failure to enact an amendment more sweeping than the *Abbott* rule cannot be taken to invalidate that rule. The text, purposes, and legislative history of the LHWCA thus provide no basis for rejecting the *Abbott* approach.[7]

B. Abbott Applies to the Present Case

General Construction further argues that even if *Abbott* is a valid interpretation of the LHWCA, it is inapplicable here because Castro's situation differs significantly from that of the claimant in *Abbott*. Specifically, (1) Castro's program did not involve an agreement with the OWCP that expressly forbade his employment during the program; (2) General Construction itself never agreed to

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[7] General Construction and LCA also invoke the language of § 8(g) of the LHWCA in support of the contention that the only money Congress intended to be provided to claimants during vocational rehabilitation is a $25 maintenance stipend. 33 U.S.C. §§ 908(g), 944. This argument ignores the plain language of the statute. Section 8(g) states that an injured worker in vocational rehabilitation who is being rendered fit for remunerative occupation "shall receive *additional* compensation necessary for his maintenance, but such *additional* compensation shall not exceed $25 a week." 33 U.S.C. § 908(g) (emphasis added). This language indicates Congress's intent that the fee be paid in addition to – not in place of – other appropriate compensation.

the rehabilitation plan; (3) the evidence showed Castro could work while enrolled in his rehabilitation program; (4) Castro was not diligent in attempting to locate work while pursuing the program; (5) completion of the program would not increase Castro's earning capacity; and (6) Castro, unlike the claimant in *Abbott*, suffered scheduled injuries, and *Pepco* therefore limits Castro to recovery under the LHWCA's schedule.

We agree with the Fourth Circuit in *Newport News* that *Abbott* did not set forth a rigid rule and that a number of factors enumerated by the BRB may be relevant to determining whether an individual may receive benefits while enrolled in a rehabilitation program. These include whether enrollment in the rehabilitation program precludes any employment; whether the employer agreed to the rehabilitation plan and continuing payment of temporary total disability benefits; whether completion of the program would benefit the claimant by increasing his wage-earning capacity; and whether the claimant showed full diligence in completing the program. *Newport News*, 315 F.3d at 293 (citing *Gregory*, 32 Ben. Rev. Bd. Serv. 264). The Fourth Circuit observed that no one of these factors, standing alone, should necessarily be considered determinative. 315 F.3d at 295-96.

With respect to General Construction's first argument, the ALJ noted that the BRB has interpreted *Abbott* to require only that a claimant show that, as a practical matter, he cannot obtain suitable alternative employment, not that he is contractually precluded from working. *See Kee*, 33 Ben. Rev. Bd. Serv. at 223. This approach makes sense given the language and purposes of the LHWCA, which provides for compensation for a claimant's reduced earning capacity under a variety of circumstances. *See*,

e.g., 33 U.S.C. §§ 902(10) (defining "disability"), 908(a) (providing for determination of permanent total disability "in accordance with the facts"). A claimant's earning capacity suffers as a result of his inability to engage in alternative employment, regardless of the cause of that inability. We agree with the ALJ that neither *Abbott* nor the LHWCA should be read to require that the inability have a contractual basis.

With respect to General Construction's second argument, the ALJ noted that General Construction objected to the rehabilitation plan and to continued benefits. But the ALJ also reasoned that allowing employers an effective veto power over OWCP-approved rehabilitation programs would undermine the LHWCA's general policy of encouraging rehabilitation. We agree. There was no error in the ALJ's decision that General Construction's objection to the rehabilitation program does not sufficiently distinguish Castro's case from *Abbott*.

With respect to General Construction's third argument, regarding evidence of Castro's ability to work while pursuing his rehabilitation program, the ALJ evaluated relevant evidence, including the testimony of Castro and vocational experts Carol Williams and Kent Shafer. The ALJ based his decision that Castro could not work while pursuing his program mainly on Castro's uncontradicted testimony that, including commuting, class, and study time, he devoted between forty-six and fifty-four hours per week to completion of the program.[8] General Construction

[8] Williams stated that Castro's intellectual capacity and long commute would make combining school with a job difficult, while Shafer noted that travel requirements combined with cognitive capacity could prevent some people from working while in school.

notes that Castro worked briefly in a paid internship. But Castro had to resign this internship after eighty hours of work because of the demands of his rehabilitation program. The ALJ found this to be evidence that Castro was willing but unable to work, despite testimony to the contrary by General Construction's expert. The ALJ's factual finding is supported by substantial evidence. 33 U.S.C. § 921(b)(3); *Container Stevedoring Co.*, 935 F.2d at 1546.

The ALJ similarly considered General Construction's fourth argument, that Castro failed to show he searched diligently for work while pursuing his rehabilitation program. This argument is largely foreclosed by the ALJ's determination that the time demands of Castro's program precluded his employment during the program. Castro also presented evidence that he investigated jobs identified by General Construction but found them either unavailable or impracticable because of his commute. The ALJ's finding is thus supported by substantial evidence.

The ALJ also found that Castro was diligent in completing his program. *See Newport News*, 315 F.3d at 293 (citing *Gregory*, 32 Ben. Rev. Bd. Serv. 264). The ALJ found that, although Castro expressed concerns about falling behind in school, his records indicated that his enrollment since 1999 had not been significantly interrupted and that at the time of the hearing he was on schedule to complete his program. The ALJ's finding that Castro had pursued his degree in the program diligently is supported by substantial evidence.

The ALJ also considered General Construction's fifth argument, that *Abbott* should not apply because Castro's rehabilitation program was not designed to improve his

earning capacity. The ALJ noted that, although hotel management starting salaries were comparable to the salaries in the jobs General Construction had identified, Castro's vocational advisors reasonably determined that training in hotel management would give Castro the best long-term earning potential.[9] The ALJ was correct to focus on Castro's long-term wage-earning prospects in assessing the rehabilitation program, *see Newport News*, 315 F.3d at 295-95 ("an immediate increase in wage earning capacity . . . is not . . . determinative"); *Abbott*, 40 F.3d at 128 (looking to employee's long-term increase in wage-earning capacity in assessing reasonableness of vocational rehabilitation program), and his factual determination that Castro's rehabilitation program provided the best long-term wage-earning prospects is supported by substantial evidence.

Neither the ALJ nor the BRB considered at length General Construction's argument concerning the application of *Pepco*, 449 U.S. 268 (1980), to Castro's case. However, the ALJ's interpretation of the scope of *Pepco* correctly precluded application of that case to Castro's claim for total disability benefits during his rehabilitation program. In *Pepco*, the Supreme Court held that where a claimant is entitled to partial disability benefits for a scheduled injury, those benefits are the claimant's exclusive remedy; a claimant with a scheduled injury may not elect to recover benefits for partial disability on the basis of the claimant's loss in earning capacity. *Id.* at 273-74. General Construction argues that if a claimant has a

[9] Williams estimated that Castro could earn between $30,000 and $40,000 annually as a hotel manager, as compared to the $16,640 to $25,000 potential of the jobs identified by General Construction.

scheduled injury, and the employer shows that the claimant is employable, the claimant cannot also be entitled to an award of total disability benefits during a rehabilitation program; the argument implies that allowing recovery for the time spent in the rehabilitation program is analogous to allowing recovery for a loss in earning capacity. The argument fails because, as the ALJ correctly noted, *Pepco* addresses only the statutory provisions for partial disability benefits. *See id.* at 274 & n.8; see also *Brown*, 34 Ben. Rev. Bd. Serv. at 198 (finding scheduled nature of claimant's injury irrelevant to appropriateness of rehabilitation program and award of benefits for that period); *Gregory*, 32 Ben. Rev. Bd. Serv. at 265-66 (noting that "where claimant is totally disabled the schedule does not apply" and that "the fact that any permanent partial disability would be covered by the schedule is not determinative of the total disability issue"). Since *Pepco* does not address computations of awards for temporary total disability, which is the focus of the *Abbott* rule, we agree with the ALJ and the BRB that the scheduled or unscheduled nature of a claimant's injury is irrelevant.

We conclude that the ALJ and BRB did not err in finding that Castro's case did not differ materially from *Abbott* and *Newport News* so as to preclude application of the *Abbott* rule. We therefore affirm the award of permanent total disability benefits to Castro during his participation in his OWCP-approved rehabilitation program.

III. CALCULATION OF AVERAGE WEEKLY WAGE

General Construction contends that the ALJ erred in calculating Castro's average weekly wage under § 10(a) of the Act, 33 U.S.C. § 910(a). Although § 10(a) is presumed

to apply absent a showing that its application would be unreasonable, and although the ALJ properly applied this provision under Ninth Circuit precedent, *Matulic*, 154 F.3d 1052 (9th Cir. 1998), General Construction argues that we should overrule that precedent or at least distinguish it.

The relevant subsections of § 10 of the Act state:

> Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding the injury, his average annual earnings shall consist of . . . two hundred and sixty times the average daily wage or salary for a five-day worker. . . .
>
> (c) If . . . the foregoing methods of arriving at the average annual wage of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality.
>
> . . .

33 U.S.C. § 910(a), (c) (2000).

Section 10(a) plainly applies if the employee "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding the injury." 33 U.S.C. § 910(a). In *Matulic*, we addressed the meaning and scope of the language "substantially the whole of the year immediately preceding [the] injury." 154 F.3d at 1056. Noting that "some 'overcompensation' is built into the [LHWCA] system institutionally," we concluded that the LHWCA's language did not require a claimant to have worked 100% of the potential working days during the year immediately preceding the injury in order for § 10(a) to apply "reasonably and fairly." *Id.* at 1057. Specifically, we held that § 10(a) presumptively applies "when a claimant works more than 75% of the workdays of the measuring year."[10] *Id.* at 1058. It may even apply when the claimant has worked less than 75% of these days, if the reduction in working days is "atypical of the worker's actual earning capacity." *Id.*[11] In *Matulic*, the claimant worked 213 days in the relevant year, or 82% of the statutory 260 days. *Id.* at 1058. We recently approved application of *Matulic* and § 10(a) where a claimant worked 197 days, or 75.77% of

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[10] We based this conclusion in part on our observation in an earlier case that "the point at which the disparity between the claimant's actual days worked and the [potential days worked] becomes unreasonable or unfair, [triggering application of § 10(c),] is 'a question of line-drawing.'" *Matulic*, 154 F.3d at 1057-58 (quoting *Duncanson-Harrelson Co. v. Dir., OWCP*, 686 F.2d 1336, 1343 (9th Cir. 1982)). We determined in *Matulic* that the 75% threshold was an appropriate place to draw this line. 154 F.3d at 1057-58.

[11] We further noted that § 10(c) "may not be invoked in cases in which the only significant evidence that the application of [§ 10(a)] would be unfair or unreasonable is that claimant worked more than 75% of the days in the year preceding his injury." *Matulic*, 154 F.3d at 1058-59.

the statutory total. *Stevedoring Servs. of Am. v. Price*, 382 F.3d 878, 884-85 (9th Cir. 2004).

General Construction argues that (1) *Matulic* is contrary to the language of the LHWCA and should be overruled and that (2) even if *Matulic* is good law, it does not apply to Castro's case. We consider each of these arguments in turn.

A. Matulic Is Good Law

General Construction's primary arguments for overruling *Matulic* are as follows: (1) *Matulic* permits and promotes overcompensation of claimants, a result contrary to the plain language of the LHWCA; (2) the 75% bright line drawn in *Matulic* creates absurd results; (3) *Matulic* is inconsistent with the law in other circuits and with the reasoning in relevant Supreme Court precedent.

To begin, we note that "[w]e are bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions." *Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 983 (9th Cir. 2002) (citation omitted). Because none of these conditions applies, we reject General Construction's arguments. Even if we had the capacity to overrule *Matulic*, however, we would reach the same conclusion.

In *Matulic* itself, we addressed concerns about whether potential overcompensation was consistent with the purposes of the LHWCA. 154 F.3d at 1057. We noted that no one in the country works every working day of every work week and that Congress must have known that some overcompensation would result from the standard work year of 260 days provided for in the LHWCA. *Id.* We

reasoned that any inaccuracies in estimating wage-earning capacity should normally favor the worker, given the "humanitarian purposes" of the Act and our mandate to construe its provisions broadly in favor of workers. *Id.*[12] General Construction rests virtually its entire argument that the LHWCA reflects a policy against overcompensation on the existence of § 10(c), which acknowledges the possibility that weekly wage calculations may be unfair or unreasonable in some circumstances. Given the virtual inevitability of overcompensation under § 10(a), we decline to interpret the existence of § 10(c) as a statutory bar to any application of the LHWCA resulting in arguable overcompensation.

General Construction's absurdity argument rests on the contention that a worker who has worked 75% of the statutory days will have worked an average of 3.75 days per week, but under § 10(a) will receive the same compensation as a worker who worked 5 days per week. This argument would appear to attack not only the line drawn in *Matulic* but also the drawing of a line at all. General Construction does not explain when such a disparity would not rise to the level of absurdity; if any disparity between actual hours worked and compensation is an absurd result, as General Construction's argument implies, then no claimant who worked less than 100% of the statutory 260 days would be entitled to application of § 10(a). Yet the plain language of § 10(a) itself does not

[12] It should also be noted that whether "overcompensation" occurs at all under *Matulic* is questionable. The LHWCA does not compensate for, among other things, lost pay increases or the lost value of fringe benefits. These gaps in compensation may be partly responsible for Congress's decision to provide for calculation methods that would tend to overcompensate for time worked rather than to undercompensate.

require this. Rather, the subdivision applies to claimants who have worked "*substantially* the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a) (emphasis added). "Substantially" would be meaningless if we were to follow General Construction's suggested interpretation of § 10(a), and as a result we decline to do so.

General Construction also argues that *Matulic* is inconsistent with the law in other circuits and with Supreme Court precedent. The only circuit opinion cited reaching a result contrary to *Matulic* is *Strand v. Hansen Seaway Service, Inc.*, 614 F.2d 572 (7th Cir. 1980). But we acknowledged and rejected *Strand* in *Matulic* itself, noting "[w]e do not believe such a rigid rule [requiring use of § 10(c) where claimant had worked 84% of the days in the statutory year] is consistent with the intent or purpose of the [LHWCA]." *Matulic*, 154 F.2d at 1058 n.4. General Construction offers no compelling reason for us to revisit this conclusion.

General Construction also cites the Supreme Court's opinion in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).[13] But the limited, technical holding in *Greenwich Collieries*[14] is irrelevant to the soundness of our

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[13] This opinion predates our decision in *Matulic*, so that General Construction's reliance on it amounts, again, to a contention that *Matulic* was wrongly decided – not to an argument that intervening Supreme Court precedent requires us to reject *Matulic*'s rule.

[14] In *Greenwich Collieries*, the Supreme Court rejected an evidentiary rule devised by the Department of Labor for use in benefits claims cases where an ALJ found the evidence on a disputed question to be in equipoise. 512 U.S. at 269. Under this "true doubt" rule, the ALJ was to resolve such questions in the claimant's favor. *Id.* The Supreme Court rejected this rule as contrary to the language of the governing statutes. *Id.* at 280-81. But the Court also implicitly distinguished the true doubt rule from other procedural and interpretive techniques favoring

(Continued on following page)

decision in *Matulic* to interpret § 10(a) broadly in light of the remedial purposes of the LHWCA. *See* 154 F.3d at 1055, 1057. Even were we empowered to overrule *Matulic*, General Construction has presented no convincing reason for us to do so.

B. Matulic Applies to the Present Case

General Construction argues that even if we do not overrule *Matulic*, we should not apply it to the present case because the decision of the ALJ and BRB that § 10(a) could "reasonably and fairly" be applied was not supported by substantial evidence. 33 U.S.C. § 910(c). General Construction maintains that use of § 10(a) to compute Castro's award amounts to an unfair and unreasonable windfall.

This approach has been foreclosed by *Matulic* itself, which established as a matter of law that application of § 10(a) to a claimant who had worked 75% or more of the statutory 260 days is not unfair or unreasonable. 154 F.3d at 1058-59. During the year preceding his injury, Castro worked 201.35 days out of 260, approximately 77.4% of the year. His case fits precisely within the rule established in *Matulic*. The fact that he worked fewer days than did the claimant in *Matulic* is not, under the reasoning in that

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claimants under remedial statutes such as the LHWCA. *See id.* at 280 ("In part due to Congress' recognition that claims such as those involved here would be difficult to prove, claimants . . . benefit from certain statutory presumptions easing their burden. Similarly, the Department's solicitude for benefits claimants is reflected in the regulations adopting additional presumptions. But with the true doubt rule the Department attempts to go one step further.") (internal quotation marks and citations omitted).

decision, a basis for distinguishing the case or refusing to apply its rule.[15] *Id.*

General Construction also argues that, unlike the claimant in *Matulic*, Castro never earned a weekly wage comparable to the result of the § 10(a) calculation in his case. It notes that the difference between the annual wage resulting from a § 10(a) calculation and Castro's actual earnings in the previous year is approximately $12,000. This is not significantly different from the situation in *Matulic* itself, in which under § 10(a) the claimant received a wage increase of approximately $10,000. 154 F.3d at 1056. It is true that we found the previous year's earnings of the claimant in *Matulic* to have been anomalously low. *Id.* at 1058. However, that finding was not the basis for our articulation of the bright-line 75% rule. *Id.* at 1058-59. We based our holding in *Matulic* on an examination of the purposes of the LHWCA, not the fairness of the result in the particular case. *See id.* at 1057-59. The factual distinction noted by General Construction is therefore irrelevant to whether or not *Matulic* applies to the present case. The ALJ and BRB accordingly did not err in applying *Matulic* and approving calculation of Castro's average weekly wage under § 10(a).

IV. GENERAL CONSTRUCTION'S PROCEDURAL RIGHTS

General Construction argues that it demanded, but was improperly denied, a hearing before an ALJ to determine the

[15] We even noted in *Matulic* that it might be neither unfair nor unreasonable to apply § 10(a) in a case involving a claimant who had worked less than 75% of 260 days. 154 F.3d at 1058.

necessity of a vocational rehabilitation program for Castro before that plan was implemented. According to General Construction, the LHWCA provides it with the right to an ALJ hearing upon request. 33 U.S.C. § 919(c), (d). General Construction also contends that the OWCP violated its Fifth Amendment due process rights when the OWCP imposed compensation liability on General Construction for the duration of a rehabilitation plan into which it had no input.[16] We address these arguments in turn.

A. The OWCP Did Not Violate General Construction's Statutory Procedural Rights

The LHWCA provisions General Construction cites state only that "the deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon," 33 U.S.C. § 919(c), and that such hearings will be governed by the APA. *Id.* § 919(d).

We recently described the scope of § 919(c) in *Healy Tibbitts*, 201 F.3d at 1094. We held that "section 919(c)

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[16] General Construction also argues more broadly that the rule in *Abbott* is "unconstitutional" because it deprives employers of due process. But an employer may receive a hearing if it controverts or contests an injured employee's claim for benefits. *See* 33 U.S.C. §§ 914(d), (h). And if an ALJ determines that an employer paid a claimant more in benefits than required by law, the ALJ may order deduction of the overpayment from future payments to the claimant. *See, e.g., Bush v. I.T.O. Corp.*, 32 Ben. Rev. Bd. Serv. (MB) 213, 215 n.5 (1998) (noting ALJ's order that overpayment be recovered by deductions from claimant's continuing benefit payments). Given these safeguards, *Abbott* puts employers at no risk of suffering any kind of permanent wrongful deprivation.

does not necessarily require an evidentiary hearing before an ALJ on all contested issues." *Healy Tibbitts*, 201 F.3d at 1093. We held that ALJs in fact lack jurisdiction over certain disputes, in particular those involving "strictly legal issues," *id.* at 1095, and matters within the discretion of a District Director turning on assessments of "reasonableness" and not involving factual questions resolvable by an ALJ, *id.* at 1097. Thus, the existence of a dispute does not in itself trigger a right to a hearing under the LHWCA.

The dispute in the present case concerned the initial reasonableness of the vocational rehabilitation plan undertaken by Castro and approved by the OWCP. This determination, while not entirely a legal issue, *Healy Tibbitts*, 201 F.3d at 1095, turned on a "reasonableness" decision and did not require any factual determinations of disputed issues by an ALJ, *id.* at 1097. Moreover, the LHWCA and its accompanying regulations commit the direction and therefore also the approval of such rehabilitation programs to the discretion of the Director. *See* 33 U.S.C. § 939(c)(2) ("The Secretary shall direct the vocational rehabilitation of permanently disabled employees."); 20 C.F.R. §§ 701.202 (delegating to OWCP Director authority for administering LHWCA), 701.301(a)(6), (7) (delegating to District Director administrative approval authorities of OWCP Director), 702.506 (providing that "[t]he vocational rehabilitation advisor shall arrange for and develop all vocational training programs"). Under *Healy Tibbitts*, the LHWCA did not entitle General Construction to an ALJ hearing on the reasonableness of Castro's rehabilitation plan prior to the implementation of that plan.

General Construction also argues that the failure to afford it a hearing violated the APA. But § 919(d) merely requires that any hearings ordered by the Director be conducted in accordance with the APA. 33 U.S.C. § 919(d); *see also Healy Tibbitts*, 201 F.3d at 1094. If no hearing is required, no question as to whether the APA has been violated can arise. We conclude that the OWCP's failure to order an ALJ hearing regarding Castro's rehabilitation program prior to approval of the program did not violate the provisions of the LHWCA.

B. The OWCP Did Not Violate General Construction's Constitutional Due Process Rights

General Construction claims it was entitled to a hearing before an ALJ prior to implementation of the vocational rehabilitation program, which deprived it of property by requiring payment of benefits to Castro, in violation of the Due Process Clause of the Fifth Amendment. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).[17]

The flaw in General Construction's argument is that the OWCP's implementation of Castro's rehabilitation plan did not, in itself, deprive General Construction of its

[17] Specifically, General Construction argues that it "had a direct financial stake in whether the vocational plan concocted by the consultant hired by the Department of Labor went forward because, under *Abbott*, it was going to be liable for total disability compensation under that program." As noted, any liability for compensation on General Construction's part under *Abbott* did not arise until Castro had (1) filed a claim for benefits and (2) at a hearing, carried his burden of showing that his rehabilitation program precluded his employment. *See Kee*, 333 Ben. Rev. Bd. Serv. at 223 (holding that claimant has burden of showing that "suitable alternative jobs were realistically unavailable while he was in the [rehabilitation] program").

property, since that implementation did not automatically trigger payment of permanent benefits to Castro. When the issue of disability compensation arose with Castro's filing of a claim for benefits, the District Director properly forwarded the matter to the Office of Administrative Law Judges for further handling, and an ALJ held a full hearing on the merits of Castro's claim for benefits. General Construction received notice and an opportunity to submit evidence and argument before the ALJ's decision awarding compensation and before it was required to pay anything. This constituted a sufficient predeprivation hearing. *See Mathews*, 424 U.S. at 333 (1976) (requiring the opportunity to be heard "at a meaningful time and in a meaningful manner") (internal quotation marks and citations omitted); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (requiring that a party have the opportunity for "some kind of a hearing" before being deprived of a significant property interest) (citation omitted). We conclude, therefore, that the OWCP's handling of Castro's claim for benefits did not deprive General Construction of its due process rights under the federal Constitution.

CONCLUSION

For the above-stated reasons, we DENY the petition for review.

DENIED.

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

[SEAL]

BRB No. 02-0783

ROBERT CASTRO Claimant-Respondent v. GENERAL CONSTRUCTION COMPANY and LIBERTY NORTHWEST INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS Respondent LONGSHORE CLAIMS ASSOCIATION *Amicus Curiae*	PUBLISHED DATE ISSUED: May 13 2003 DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Nicole A. Hanousek (Law Offices of William D. Hochberg), Edmonds, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott), Seattle, Washington, for employer/carrier.

Peter B. Silvain, Jr. (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Samuel J. Oshinsky, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Francisco, California, for *amicus curiae*.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-515) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board held oral argument in this case in Seattle, Washington on January 29, 2003, and pursuant to 20 C.F.R. §802.215, we hereby accept the pleadings filed by employer and by the *amicus curiae* subsequent to the oral argument.

The parties do not dispute the facts of this case. Claimant worked as a pile driver for employer, and on November 20, 1998, he fell, tearing the anterior cruciate ligament in his right knee. After undergoing and recovering from reconstructive surgery on December 30, 1998, and two subsequent surgeries, claimant was released to return to light duty work on August 14, 2000. Claimant attempted to return to work at employer's facility, but the

job proved to be too strenuous, and Dr. Mandt determined that the duties were beyond claimant's restrictions.[1] Because employer offered no other light duty work, Dr. Mandt recommended vocational retraining.

Employer hired firms to conduct labor market studies, and those surveys identified jobs the counselors believed claimant could perform with starting wages ranging from $8 to $10 per hour. Cl. Ex. 8; Emp. Ex. 3. The Office of Workers' Compensation Programs (OWCP) referred claimant to a vocational rehabilitation counselor, Ms. Williams, to develop a rehabilitation plan. Based on their collaborative effort, claimant enrolled in a hotel tourism program at a local college and was scheduled to take classes from September 13, 2000, through June 7, 2002. Cl. Ex. 5. Upon completion of the program, claimant was expected to earn approximately $16,000 per year in an entry-level position and then, with experience, progress up to approximately $27,580 per year or possibly $30-40,000 per year if he became an assistant manager or a manager at a larger hotel. Emp. Ex. 5. As of the date of the hearing, June 20, 2001, and the date of the administrative law judge's decision, May 8, 2002, claimant had not completed his schooling. Claimant filed a claim seeking permanent partial disability benefits under the schedule for a 35 percent impairment to his right knee and temporary and permanent total disability benefits while enrolled in the vocational rehabilitation program.

The administrative law judge awarded claimant permanent partial disability benefits for a period of 48.96

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[1] Claimant had also attempted to return to work between June 14 and July 13, 1999.

weeks (17% of 288) pursuant to Section 8(c)(2), (19), 33 U.S.C. §908(c)(2), (19). Decision and Order at 10. On the issue of total disability benefits, the administrative law judge determined that claimant demonstrated an inability to return to his usual work and that employer established the availability of suitable alternate employment. Decision and Order at 4, 11. He found that the jobs identified by Messrs. Ewald and Shafer, experts hired by employer, and affirmed by Mr. Owings, who inherited claimant's case after Ms. Williams retired, constituted suitable alternate employment. Cl. Ex. 8; Emp. Exs. 3, 5. Nevertheless, because claimant was enrolled in a vocational rehabilitation program, the administrative law judge awarded claimant total disability benefits for the duration of the program pursuant to *Abbott v. Louisiana Insurance Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Decision and Order at 11. Although the administrative law judge acknowledged that *Abbott* does not apply in every case where the claimant is enrolled in vocational rehabilitation, he applied it to this case because he found claimant demonstrated that enrollment in the program precluded employment in light of claimant's commuting time, class time, and study time, and that participation in the program would give claimant the best long-term earning potential. Decision and Order at 11-13. Accordingly, he awarded claimant temporary total disability benefits from July 14, 1999, until August 13, 2000, when claimant's condition reached maximum medical improvement, and permanent total disability benefits thereafter until June 7, 2002, the projected date of completion of the program. Decision and Order at 1 n.1, 13, 15. Finally, the administrative law judge rejected employer's assertion that claimant's average weekly wage should be calculated using Section 10(c), 33 U.S.C. §910(c),

accepted claimant's argument that use of Section 10(a), 33 U.S.C. §910(a), is proper pursuant to *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), and awarded benefits based on an average weekly wage of $1,004.37. Decision and Order at 14. The administrative law judge subsequently denied claimant's motion for reconsideration.[3] Employer appeals the administrative law judge's Decision and Order. The Longshore Claims Association (LCA) filed an *amicus curiae* brief in support of employer's position. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's decision.

Total Disability Benefits During Vocational Rehabilitation

Employer contends the administrative law judge erred in awarding claimant total disability benefits during his retraining period. Its arguments are three-fold. First, employer argues that the decision in *Abbott*, issued by the United States Court of Appeals for the Fifth Circuit, runs afoul of the Act and should not be followed in this case arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Next, employer argues that if *Abbott* is good law, it does not apply to the facts of this case. Finally, it asserts it was denied due process because of the district director's failure to transfer the case to the Office of Administrative Law Judges (OALJ) for a

[3] He stated that claimant's request to extend the award of total disability benefits to December 2002 would be better addressed in a motion for modification, as there were no documents before him to verify the need for the change.

hearing on whether claimant was entitled to vocational rehabilitation, as it objected to the program from the outset. The LCA also argues that *Abbott* is not good law and should not be followed. Claimant disagrees, and he argues that *Abbott* comports with the provisions and the intent of the Act, that neither the Act nor any other statute or constitutional right is violated, and that the evidence of record supports the administrative law judge's award of total disability benefits during the rehabilitation program. The Director agrees with claimant's position.

Applicability of *Abbott*

Employer first argues that the Fifth Circuit's decision in *Abbott* should be rejected as being contrary to the Act. The LCA agrees, citing legislative history which it asserts shows that congress did not intend for the award of total disability benefits during rehabilitation where suitable employment is otherwise available. Claimant asserts that application of the principles espoused in *Abbott* accord with the policy for awarding total disability benefits established in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), and with the Act's goal of promoting the rehabilitation of injured employees. *See also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). The Director argues that *Abbott* is good law and should be followed and that his interpretation of the Act and the regulations is due deference, as it is reasonable and has been followed consistently by the Board and the two courts that have addressed the issue.

In *Abbott*, the claimant injured his back on January 11, 1983. Ultimately, his doctor recommended vocational retraining. In the fall of 1985, Abbott began a four-year college program. The Department of Labor (DOL) paid his tuition and contractually required him to attend school full-time throughout the year and to maintain a certain minimum grade point average. Abbott completed the program, plus a one-year internship, in July 1990, and he began work as a medical technician at a public hospital. From the date of Abbott's injury until its carrier became insolvent on September 15, 1986, the employer voluntarily paid compensation to the claimant and did not object to his rehabilitation program. When the employer sought payment of claimant's compensation from Louisiana Insurance Guaranty Association (LIGA), LIGA objected to the payment of total disability benefits while Abbott was enrolled in a retraining program, asserting that the availability of suitable alternate employment had been established. The administrative law judge ultimately awarded temporary and permanent total disability benefits until Abbott completed his retraining program, and the Board affirmed the decision. *Abbott*, 27 BRBS 192. In affirming the administrative law judge's decision in *Abbott*, the Board adopted the administrative law judge's reasoning that, although Abbott could physically perform the jobs identified by the employer's expert, he could not realistically secure any of them because his participation in the rehabilitation program prevented him from working. Specifically, in light of *Turner*, 661 F.2d at 1037-1038, 14 BRBS at 160) the Board stated:

> the degree of disability is determined not only on the basis of physical condition, but also on factors

> such as age, education, employment history, rehabilitative potential, and the availability of work that claimant can perform.

Abbott, 27 BRBS at 202.

In affirming the Board's decision, the Fifth Circuit acknowledged that the Act does not specifically provide for total disability benefits during periods of rehabilitation, but, following the Board's rationale, it also determined that the award was consistent with its holding in *Turner*, 661 F.2d 1031, 14 BRBS 156. That is, the jobs identified by the employer were not "available" to Abbott because his participation in the DOL-sponsored plan precluded him from working. As the jobs were "unavailable," the employer did not establish the availability of suitable alternate employment, and Abbott was entitled to total disability benefits until the completion of the program when jobs would become "available." *Abbott*, 40 F.3d at 124-125, 127-128, 29 BRBS at 23-24, 26-27(CRT).

The Board has consistently applied *Abbott* in cases arising both within and outside the Fifth Circuit to determine whether the claimants were entitled to total disability benefits during periods of vocational retraining. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001) (Ninth Circuit); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000) (Fourth Circuit); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998) (Fourth Circuit); *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998) (Fifth Circuit); *Anderson v. Lockheed Shipbuilding & Constr, Co.*, 28 BRBS 290 (1994) (Ninth Circuit). Additionally, a recent decision of the United States Court of Appeals for the Fourth Circuit further supports the validity of *Abbott* and its progeny. *Newport News Shipbuilding &*

Dry Dock Co. v. Director, OWCP [Brickhouse], 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002).

In *Brickhouse*, claimant suffered a back injury. Unable to return to his usual work, he began a rehabilitation program in graphic communications. With only two classes remaining, in the last semester of the program, Brickhouse's former employer offered him alternate employment at its facility. The administrative law judge found, and the Board and the court affirmed, that Brickhouse's participation in the rehabilitation program precluded his acceptance of the employer's offer. Although the final courses may have been offered at night in the spring and summer semesters of 1997, the Board held that Brickhouse could not have completed his training within the time allotted by OWCP, that is by May 15, 1997, if he had taken the job; thus, the proffered employment was not available. *Brickhouse v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 98-1164, 00-520 (Feb. 6, 2001). Additionally, the Board held that *Abbott* applies even if rehabilitation does not necessarily result in an increased wage-earning capacity. The Fourth Circuit discussed *Abbott* and the Board's decision in *Gregory*, 32 BRBS 264, wherein the Board articulated factors to consider in awarding total disability benefits during vocational rehabilitation, and concluded, in agreement with the Director's position, that an increase in a claimant's wage-earning capacity is but one of several factors that must be considered and, alone, is not dispositive of a claimant's entitlement to total disability benefits during rehabilitation. Further, the court held that, considering all the relevant factors, Brickhouse had established that suitable alternate employment was unavailable to him while he

was enrolled in his retraining program.[3] *Brickhouse*, 315 F.3d at 293-296, 36 BRBS at 91-92(CRT).

Despite the consistent application of *Abbott* to permit an award of benefits where claimant is unable to work during vocational rehabilitation, employer now challenges such awards on the basis that there is no specific provision in the Act allowing for an award of total disability benefits merely because a claimant is participating in a vocational rehabilitation program. Further, it asserts, while the regulations provide the framework for DOL to develop vocational retraining programs, they do not provide for total disability awards for the duration of such programs. As neither the Act nor the regulations mention such awards, employer, citing statutory construction cases, asserts that no such awards are permitted. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992) (use the language of the Act to interpret its meaning and go beyond that language only in extraordinary circumstances); *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002) (use plain language if it is clear). The LCA expounds on employer's argument by showing that Congress considered and rejected the idea of awarding total disability benefits during periods of vocational rehabilitation. In June 1980, the House of Representatives considered a bill that stated: "an employee . . . shall be entitled to receive continued temporary total or partial compensation during the period of such rehabilitation." H.R. 7610, 96th Cong. (June 18,

[3] The Fourth Circuit also stated that the administrative law judge was entitled to conclude it was unreasonable for the employer to compel Brickhouse to choose between the job and completing his training. *Brickhouse*, 315 F.3d at 296, 36 BRBS at 92(CRT).

1980). In July 1982, a bill before the Senate omitted the phrase "be entitled to" from the wording above. Sen. Rpt. 97-498 at 58 (July 19, 1982). By 1984, when the amendments to the Act were passed, these proposed amendments had been eliminated. As a result, no specific language on disability during rehabilitation is included in the Act as it exists today. Consequently, the LCA argues that the Fifth Circuit's decision in *Abbott* effectively re-inserts the provision that was discussed and rejected by Congress.[4] As claimant counters, however, *Abbott* requires consideration of a number of factors; thus, entitlement to benefits is not automatic, as it would have been under the proposed amendments. The Director states that *Abbott* is in full compliance with the Act and the regulations and, rather than creating a new type of benefit, it merely adds another factor for the administrative law judge to consider when addressing the issue of the availability of suitable alternate employment.

We agree with claimant and the Director. The holding in *Abbott* rests, not on any novel legal concept, but on the well-established principle that, once claimant establishes a *prima facie* case of total disability, employer bears the burden of demonstrating the availability of suitable alternate employment. *See, e.g., Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Turner*, 661 F.2d 1031, 14 BRBS 156. If

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[4] Employer has filed a supplemental brief, citing A-Z *Int'l v. Phillips*, 323 F..3d 1141 (9th Cir. 2003) (plain language of the Act limits remedy for the filing of fraudulent claim to that provided in Section 31, 33 U.S.C. §931). Employer contends that, in view of Congress' rejection of the proposed amendment and of the silence in Section 39, 33 U.S.C. §939, and its implementing regulations, 20 C.F.R. §702.501 *et seq.*, regarding the payment of total disability benefits during vocational rehabilitation, such awards are precluded.

employer makes this showing, claimant may nonetheless be entitled to total disability if he shows he was unable to secure employment although he diligently tried. *See, e.g., Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). Moreover, claimant is entitled to total disability until the date suitable alternate employment is available. *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT). The decision in *Abbott* preserves these principles in the context of enrollment in a vocational rehabilitation program which precludes employment. Although Congress considered and rejected awards of total disability benefits to employees enrolled in vocational rehabilitation programs as a matter of statutory right, the failure to enact that proposal does not establish that *Abbott* runs counter to congressional intent. Entitlement to benefits during enrollment in a vocational rehabilitation program under *Abbott* is not automatic but depends on an analysis of various factors relevant to ascertaining whether employment is reasonably available. As the Director states, *Abbott* does not create a new type of award but permits consideration of factors relevant to claimant's employability consistent with existing case law.

In this respect, the *Abbott* case is like many others expounding upon and defining appropriate tests for application of the statute. For example, nominal awards are not specifically mentioned in the Act, and they extend the time frame for filing Section 22, 33 U.S.C. §922, motions for modification, but they have found favor in the courts as a rational interpretation of Section 8, 33 U.S.C. §908. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521

U.S. 121, 31 BRBS 54(CRT) (1997).[5] Similarly, in construing Section 8(f), 33 U.S.C. §908(f), the courts adopted a "manifest" requirement for an employer to receive relief under that section from continuing liability for compensation even though this requirement is not explicitly contained in the statute. *See, e.g., Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1999); *Duluth, Missabe & Iron Range Ry. Co. v. Department of Labor*, 553 F.2d 1144; 5 BRBS 756 (8th Cir. 1977); *Dillingham Corp. v. Massey*, 505 F.2d 1126 (9th Cir. 1974); *American Mutual Ins. Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970).

With regard to disability, it was left to the courts to develop criteria for demonstrating "total" and "partial" disability, and the tests created establish that the degree of disability is measured by considering economic factors

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[5] In a supplemental brief, the LCA asserts that *Rambo II* is distinguishable because Congress had not spoken on the matter of *de minimis* awards previously; therefore, it was reasonable for the courts to accept the Director's interpretation. However, it argues, the matter of total disability benefits during vocational rehabilitation had been addressed and rejected, and there is no need to look beyond the Act for Congress' intent in this regard. We disagree. While Congress did not enact the proposed automatic award of total disability benefits during vocational rehabilitation, there is nothing in the statute prohibiting total disability awards during periods of rehabilitation in appropriate circumstances, based on a number of factors consistent with case law. Similarly, we reject employer's reliance on *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003). Contrary to employer's assertion, *Ibos* does not invalidate *Abbott*. In *Ibos*, the court refused to expand the credit doctrine beyond the confines of Section 3(e), 33 U.S.C. §903(e), in order to allow an employer to offset its total liability against the claimant's settlement proceeds with prior employers. Here, there is no creation of a new award. Rather, the issue is only whether an employer has satisfied its burden of establishing the *availability* of suitable alternate employment under existing precedent.

in addition to an injured employee's physical condition. *See* 33 U.S.C. §908; *Prolerized New England Co. v. Miller*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Turner*, 661 F.2d 1031, 14 BRBS 156; *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Godfrey v. Henderson*, 222 F.2d 845 (5th Cir. 1955). Just as the courts and the Board have analyzed these issues, they have analyzed the issue of entitlement to total disability benefits during vocational rehabilitation and found, consistent with the Director's interpretation, that the *Abbott* solution is reasonable within the framework of suitable alternate employment law. *Brickhouse*, 315 F.3d at 292-296; 36 BRBS at 91(CRT); *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Brown*, 34 BRBS 195; *Kee*, 33 BRBS 221; *Gregory*, 32 BRBS 264; *Bush*, 32 BRBS 213; *Anderson*, 28 BRBS 290; *Abbott*, 27 BRBS 192. Specifically, if a claimant's rehabilitation agreement with OWCP prohibits him from extracurricular employment, or if the administrative law judge determines that the rehabilitation schedule prevents such employment; then employment is "unavailable" to the claimant. If employment is not available, even if it is otherwise suitable for the claimant, then the employer has not satisfied its burden, and the claimant is entitled to total disability benefits until the date alternate employment becomes available. *Id.*; *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Turner*, 661 F.2d 1031, 14 BRBS 156; *Bumble Bee Seafoods*, 629 F.2d 1327, 12 BRBS 660. Therefore, we reject employer's contention that *Abbott* is an invalid extension of the law, and we affirm the administrative law judge's application of it to this case arising in the Ninth Circuit.

Claimant's Entitlement Under *Abbott*

Employer next asserts that, even if application of *Abbott* is proper, claimant is not entitled to total disability benefits because he has not established that his vocational rehabilitation program precluded employment. Claimant and the Director disagree. They argue that the administrative law judge correctly considered all relevant factors and reached a reasonable conclusion supported by substantial evidence. In its decision in *Gregory*, 32 BRBS 264, the Board discussed relevant factors under *Abbott*, stating that the fact-finder should consider: whether the employer agreed to the rehabilitation plan and the continuing payment of benefits; whether the claimant's enrollment in the plan precluded employment; whether the completion of the program would result in an increased wage-earning capacity for the claimant, thereby maximizing the claimant's skills and minimizing the employer's liability; and whether the claimant showed full diligence in completing the program.[6] *Gregory*, 32 BRBS at 266; *see also Bush*, 32

[6] The Director suggests that a refinement of the criteria for ascertaining whether a claimant is entitled to total disability benefits while enrolled in a vocational rehabilitation program is necessary as some factors may impinge on the discretion of the Secretary in determining the claimant's entitlement to vocational rehabilitation. *See* discussion *infra*. We do not believe it is necessary to do so. The administrative law judge's role does not involve reviewing the implementation of the rehabilitation plan or a claimant's entitlement to rehabilitation services, but rather he assesses the effect of the plan on the claimant's employability during its implementation. The criteria identified in *Gregory* were developed from the facts supporting the award in *Abbott* and do not comprise a complete or inflexible standard. *Brickhouse*, 315 F.3d at 295, 36 BRBS at 91(CRT) ("the guiding legal principles require consideration of a wide range of the relevant factors in reaching the proper result in each case."). The whole body of law which has evolved since *Abbott* establishes that no one factor is dispositive of entitlement; thus the factors of concern to the Director, i.e., whether employer approved the plan or it

(Continued on following page)

BRBS at 219. Employer argues that consideration of these factors results in the conclusion that claimant has not established entitlement to total disability benefits pursuant to *Abbott*.

First, employer argues it did not approve of the rehabilitation plan. It asserts it established the availability of suitable alternate employment claimant could perform without resort to rehabilitative training. The administrative law judge found that employer's disapproval of the program is relevant, but it is not dispositive. Decision and Order at 12. Next, employer asserts that claimant's enrollment in the rehabilitation plan did not preclude employment. To the contrary, it states, claimant's plan required him to seek internships – paid or unpaid – and to work 700 hours. Cl. Exs. 5, 7. As classes were not offered every quarter, employer asserts claimant had ample time to work but had no real motivation to do so. Moreover, claimant secured an internship which paid $7.75 per hour, and he worked approximately 80 hours before giving it up. Tr. at 46. The administrative law judge found that claimant showed that his enrollment effectively precluded other employment as he credited claimant's testimony regarding the hours dedicated to the retraining program: commuting (approximately 20 hours per week);[7]

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is reasonable, are not dispositive. *See Brickhouse*, 315 F.3d 286, 36 BRBS at 91(CRT) (*Abbott* may be applied even if rehabilitation does not increase post-injury wage-earning capacity); *Brown*, 34 BRBS 195 (*Abbott* award may be made even if injury was to a scheduled member); *Bush*, 32 BRBS 213 (factual differences with *Abbott* do not make it inapplicable).

[7] Claimant lives on Bainbridge Island in Washington state, and he must take a ferry and a bus to get to school. His commuting time varies from 1.5 hours to 2.25 hours each way. Decision and Order at 7; Tr. at 80.

studying (approximately 25 hours per week); and attending class (15-18 hours per week). *Id.* Further, the administrative law judge credited Ms. Williams, claimant's initial vocational counselor, who testified that claimant's intellectual capacity, in addition to his long commute, would cause claimant difficulty in trying to combine work and school. *Id.*; Cl. Ex. 21. He then gave claimant credit for attempting to secure work, both before entering the rehabilitation program and during, and he found that, contrary to employer's view, claimant's inability to retain the paid internship is proof of his *in*ability to work and attend school at the same time. Decision and Order at 12.

Employer also argues that the evidence establishes that claimant's enrollment in the program would not increase his wage-earning capacity. Rather, it posits he would earn more per year if he obtained one of the jobs identified in the labor market surveys than if he completed the rehabilitation plan. Thus, employer argues that retraining was unnecessary. The administrative law judge based his conclusions on the opinions of claimant and his vocational advisors and found that enrollment in the program was best for claimant's long-term earning potential, and that starting wages in hotel management were comparable to or less than the wages of some of the jobs identified by employer but, depending upon training, experience, and hotel, could exceed $27,580 or $30,000. Decision and Order at 13. Finally, employer contends claimant did not demonstrate due diligence in completing his program, as there were multiple delays both at the outset and during the training. Employer thus contends it should not be liable for total disability benefits during claimant's retraining period. The administrative law judge found that claimant was enrolled in the program without

significant interruption since 1999 and was scheduled to complete it in June 2002. Decision and Order at 13. Accordingly, the administrative law judge awarded claimant total disability benefits for the duration of the training program, ceasing June 7, 2002. Decision and Order at 13.

We find employer's arguments unpersuasive. The administrative law judge clearly considered all of the relevant factors and reached a rational conclusion. Decision and Order at 12-13; *see also Brickhouse*, 315 F.3d at 295, 36 BRBS at 91(CRT). Although it is true employer opposed the program and there was no contractual requirement that claimant refrain from outside employment, the contract with OWCP did require claimant to attend school on a full-time basis. Further, the administrative law judge found that claimant demonstrated that the time needed for commuting, his classes, and his studies effectively prohibited outside employment unless claimant were to exhaust himself. The Board has previously affirmed a finding that outside employment was precluded on a similar rationale. *See Brown*, 34 BRBS at 198-199. As an internship was a required part of claimant's program, and, according to claimant, a paid internship was rare, it was reasonable for the administrative law judge to interpret claimant's resignation of such a position, absent evidence of any other reason, as evidence that he could not complete his schooling and work at the same time. Moreover, although the evidence establishes that claimant would have had a post-injury wage-earning capacity without any vocational rehabilitation, evidence of an eventual increased wage-earning capacity is not mandatory for an award under *Abbott*. *Brickhouse*, 315 F.3d at 295-296, 36 BRBS at 91(CRT). Nevertheless, the administrative law judge reasonably credited the testimony of

claimant and his initial counselor that retraining would help increase claimant's longterm earning potential. *See id.*; Brown 34 BRBS at 198-199. Therefore, we affirm the administrative law judge's determination, after evaluation of the relevant criteria, that claimant is entitled to total disability benefits during his vocational rehabilitation. *Brickhouse*, 315 F.3d at 296, 36 BRBS at 91-92(CRT); *Abbott*, 40 F.3d at 124-128, 29 BRBS. at 23-27(CRT); *Brown*, 34 BRBS at 198-199; *Bush*, 32 BRBS at 218-219.

Due Process

Employer next argues it was denied due process because it was not permitted a hearing on the question of whether claimant was entitled to vocational rehabilitation and whether it is liable for total disability benefits for that period. It asserts that, upon its request, the case should have been transferred to the OALJ for a hearing on this issue, citing *Ingalls Shipbuilding, Inc., v. Director, OWCP [Boone]*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996). Employer maintains that failing to transfer this case for a hearing and allowing the vocational counselor, who is not an administrative law judge, to determine the appropriateness of vocational rehabilitation violates not only the Longshore Act, 33 U.S.C. §§919, 939, but also the Administrative Procedure Act (APA), 5 U.S.C. §§554, 556, and the Fifth and Fourteenth Amendments of the Constitution, U.S. Const. amend. V, XIV, depriving employer of its due process rights by taking property without a hearing. The administrative law judge did not address these issues. As no fact-finding is involved, we shall address them.

First, while the Act grants "aggrieved parties" the right to a hearing, 33 U.S.C. §919(c), (d); *Boone*, 102 F.3d

1385, 31 BRBS 1(CRT), an evidentiary hearing before an administrative law judge is not necessarily required on all contested issues. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that purely legal disputes, or those disputes that do not require fact-finding, are not within the jurisdiction of the OALJ, and, therefore, do not require an evidentiary hearing. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000);[6] *see also Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988) (no need for hearing where sole issue concerned legal question of employer's ability to withdraw from settlement after claimant's death); *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring) (OALJ has no jurisdiction over district director authority to change the claimant's treating physician under Section 7(b)); *Olsen v. General Engineering & Machine Works*, 25 BRBS 169 (1991) (district director's denial of rehabilitation services was properly appealed to the Board); *McGrady v. Stevedoring Services of America*, 23 BRBS 106 (1989) (district director's decision regarding propriety of Section 14(f) penalty properly before the Board); *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989) (within the district director's discretion to determine whether the Special Fund is liable for the claimant's vocational rehabilitation

[6] Although it noted that the United States Court of Appeals for the Seventh Circuit has held that parties have an absolute right to a hearing in all contested cases, *Pearce v. Director, OWCP*, 647 F.2d 715, 13 BRBS 241 (7th Cir. 1981), the Ninth Circuit specifically disagreed with the Seventh Circuit's rationale and stated that "*Pearce* has not been followed or cited favorably by any other court." *Cabral*, 201 F.3d at 1096, 33 BRBS at 214(CRT).

expenses). In *Cabral*, the court specifically held that as disputes regarding the amount of an attorney's fee award are within the sole discretion, of the district directors, they do not require an evidentiary hearing. In such cases where an evidentiary hearing is not necessary, review of the district director's determination is best effectuated through appeal to the Board.

In this case, the issue employer sought to bring before an administrative law judge involved whether claimant was entitled to vocational rehabilitation. Section 39(c)(1)-(2) of the Act, 33 U.S.C. §939(c)(1)-(2) (emphasis added), addresses vocational rehabilitation and states in relevant part:

> (c)(1) *The Secretary* shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim. *The Secretary may, upon* request, provide persons covered by this chapter with legal assistance in processing a claim. *The Secretary shall also provide employees receiving compensation information on* medical, manpower, and *vocational rehabilitation services and assist such employees in obtaining the best such services available.*
>
> (2) *The Secretary shall direct the vocational rehabilitation of permanently disabled employees* and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such rehabilitation . . . where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund

> provided for in Section 44 in such amounts as may be necessary to procure such services. . . .

Where statutory authority is placed in "the Secretary," that authority is wielded by the district directors, as the Secretary's discretionary authority has been delegated to those officials. 20 C.F.R. §§701.201, 701.202, 701.301(a), (6), (7). *See Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347, 351 (1994) (McGranery, J., dissenting).

The implementing regulations set forth the procedures by which an injured employee may obtain vocational rehabilitation or retraining. 20 C.F.R. §§702.501 *et seq.* Section 702.501 states that the purpose of such retraining is to return permanently disabled persons to gainful employment. 20 C.F.R. §702.501. Section 702.502 provides that the district director or a member of his staff shall promptly refer an eligible claimant to the vocational rehabilitation advisor, and Sections 702.503-702.506 set forth the advisor's responsibilities with regard to the claimant's rehabilitation, from screening the claimant to developing the training program to monitoring the claimant's progress. 20 C.F.R. §§702.502-702.506. The regulations do not give employers a role in forming or approving vocational rehabilitation programs. *Id.* Because Section 39(c)(2) and its implementing regulation grant the authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, and such determinations are within their discretion, the OALJ has no jurisdiction to address the propriety of vocational rehabilitation. *Olsen*, 25 BRBS at 171 n.3; *Cooper*, 22 BRBS at 40-41. Thus, in the case at bar, as the question of whether the claimant was entitled to vocational rehabilitation is a discretionary one afforded the district director, and, as discretionary decisions of the district director are not

within the jurisdiction of the OALJ, it was appropriate for OWCP to retain the case until it received a request for a hearing on the merits.[9] *Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT); *Cooper*, 22 BRBS at 40-41. Accordingly, contrary to employer's argument, neither the Act nor the APA, which does not come into effect, has been violated. We, therefore, reject employer's argument that it was deprived of due process because the case was not transferred to the OALJ upon its request.

We also reject employer's contention that its constitutional rights to due process were violated by the taking of its assets without a chance to be heard on the issue: As Director points out, employer confuses its rights and obligations concerning two distinctly different decisions which the Act reserves to separate decision makers. This appeal stems from an evidentiary hearing before an administrative law judge on the issue of claimant's entitlement to disability benefits. Whether claimant is entitled to total disability benefits during his enrollment in vocational rehabilitation is a question of fact, and employer received a full hearing on this issue before being held liable for benefits. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). With regard to implementation of claimant's vocational rehabilitation plan, Director concedes that employer is entitled

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[9] Thus, employer's remedy if it disagreed with the district director's decision regarding rehabilitation was appeal to the Board for review under an abuse of discretion standard. *Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT). That this could result in the bifurcation of the case is an insufficient basis to ignore the statutory scheme giving exclusive authority to the Secretary and the district directors. *See Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347, 353-354 (1994) (McGranery, J., dissenting).

notice and an opportunity to comment prior to implementation of the plan, noting that employer received ample notice and opportunity to comment. Moreover, employer could have filed a direct appeal to the Board if it believed the district director abused his discretion under the Act and regulation. *See Cabral*, 201 F.3d at 1095, 33 BRBS at 213(CRT); *Cooper*, 22 BRBS at 40-41. Under Section 39(c)(2), the costs of vocational rehabilitation are payable from the Special Fund.[10] Congress has set forth the vocational rehabilitation process, and the district director and the administrative law judge in this case followed the proper procedures with regard to claimant's rehabilitative services. 33 U.S.C. §939(c); 20 C.F.R. §702.501 *et seq.*

Average Weekly Wage

Employer also contends the administrative law judge misinterpreted *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), and erred in computing claimant's average weekly wage under Section 10(a) of the Act, 33 U.S.C. §910(a). Specifically, employer argues that *Matulic* is distinguishable from the case herein, that use of Section 10(a) results in benefits based on an unfounded increase of $12,000 over claimant's historical earnings and that Section 10(c), 33 U.S.C. §910(c), should be used to compute claimant's average weekly wage.[11] The LCA

[10] To the extent that employer seeks a hearing prior to the imposition of liability for benefits, we note that pre-deprivation hearings are not available under the Act. *Kreschollek v. Southern Stevedoring Co.*, 223 F.3d 202, 34 BRBS 48(CRT) (3d Cir. 2000).

[11] Employer divides claimant's earnings for 1998, $39,345.80, by 52 to reach an average weekly wage of $756.65; however, employer's calculation fails to include some wages from 1997 which would complete the 52-week period.

argues that previous Ninth Circuit cases show that the court did not establish a hard and fast rule in *Matulic* but, rather, sought to implement a standard that would be fair based an the facts of the case. That is, use of Section 10(a) is presumed but can be rebutted based on the facts of each particular case, although rebuttal cannot be based solely on the number of days worked. Citing *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 1101 (1983), and *Marshall v. Andrew F. Mahoney Co.*, 56 F.2d 74 (9th Cir. 1932), the LCA argues that Ninth Circuit precedent supports finding an average weekly wage that represents the claimant's true lost earning capacity and not one that ignores his earning history. Claimant interprets *Matulic* as establishing a "clear bright line" for defining "substantially the whole of the year." He asserts that, because his number of workdays surpassed the *Matulic* 75 percent mark, he is presumptively entitled to a computation of his average weekly award under Section 10(a). The Director concurs.

Section 10(a) of the Act, 33 U.S.C. §910(a) (emphasis added), states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during *substantially the whole of the year* immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

The Board has held that 42 weeks is "substantially the whole of the year," *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd and remanded on other grounds*, 640 F.2d 769, 12 BRBS 237 (5th Cir. 1981), but that 33 weeks is not, *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979). Because the term is undefined, the Ninth Circuit addressed where the line should be drawn in *Matulic*.

In *Matulic*, the administrative law judge found that the claimant actually earned $43,370.81 in the year preceding his injury and that use of Section 10(a) would result in calculated earnings of $52,941.20; thus, he concluded that Section 10(a) could not be used because it would overestimate the claimant's annual earnings. On appeal, the Ninth Circuit held that under the statutory framework, Section 10(a) must be used in calculating average weekly wage unless to do so would be unreasonable or unfair. *Matulic*, 154 F.3d. at 1057, 32 BRBS at 150-151(CRT); *see* 33 U.S.C. §910(c).[12] Based on this congressional mandate, the Ninth Circuit held that "mere" overpayment due to the application of Section 10(a) is not unreasonable or unfair but is built into the system. *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT); *see also Duncanson-Harrelson*, 686 F.2d at 1342. After discussing its decision in *Duncanson-Harrelson*,[13] the court concluded:

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[12] Section 10(c) applies "[i]f either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied. . . ."

[13] The Ninth Circuit affirmed the use of Section 10(c) in *Duncanson-Harrelson* because use of Section 10(a), while technically proper in that the claimant worked substantially the whole of the year, would result in overcompensation as claimant was a seasonal worker and would be compensated for working 65 more days than he actually

(Continued on following page)

"when a claimant works more than *75%* of the workdays of the measuring year the presumption that §910(a) applies is not rebutted."[14] *Id.*, 154 F.3d at 1058, 32 BRBS at 151(CRT). Thus, because Matulic worked 82 percent of the days and because the nature of his employment was stable and continuous, the court held that the administrative law judge should have applied Section 10(a). *Id.*, 154 F.3d at 1058, 32 BRBS at 152(CRT).

The Board followed *Matulic* in *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *appeal pending* No. 02-71207 (9th Cir.). In *Price*, the administrative law judge found that the claimant's employment was stable and continuous. During the 52 weeks preceding his injury, Price worked 197 days of the possible 260. The administrative law judge found that this number of days worked

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worked. *Duncanson-Harrelson*, 686 F.2d at 142-143. In *Marshall*, the Ninth Circuit determined that it was improper to use Section 10(b), 33 U.S.C. § 910(b), to determine the claimant's average weekly wage when the similarly-situated worker worked over 100 days more than did the claimant during the work year. *Marshall*, 56 F.2d at 75-76, 78. The court noted that the claimants in both *Duncanson-Harrelson* (75%) and *Marshall* (61%) worked substantially fewer of the workdays than did Matulic (82%). *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT). Relying on the statement in *Duncanson-Harrelson* that the point at which the disparity between claimant's actual days of work and the 260-day standard becomes unreasonable is "a question of line-drawing," the court drew the line where *Duncan-Harrelson* left it, *i.e.*, at more than 75 percent of work days.

[14] The court noted that in *Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980), the Seventh Circuit applied Section 10(c) where a claimant worked 84 percent of the workdays. The Ninth Circuit felt that a line drawn at 84 percent was too rigid and stated: "We do not believe such a rigid rule is consistent with the intent or purpose of the Act." *Matulic*, 154 F.3d at 1058 n.4, 32 BRBS at 151n.4(CRT). In *Strand*, moreover, the court relied on the fact that claimant was a seasonal worker in holding Section 10(c) applies.

equated to 75.7 percent and required application of Section 10(a) pursuant to *Matulic*. *Price*, 36 BRBS at 62. The Board affirmed the administrative law judge's conclusion, holding that *Matulic* set the threshold for application of Section 10(a) at 75 percent, and Price met that level. *Id.*

The administrative law judge herein found that claimant earned $38,422.57 in 1995, $38,571.33 in 1996, $39,648.34 in 1997, and $39,717.62 in 1998. In the 52 weeks prior to the injury, he found that claimant earned a total of $40,466 by working 1,611 hours or 201.35 days,[15] which amounts to 77.4 percent of the 260-day standard work year for a five-day per week worker. Decision and Order at 9, 14; Cl. Exs. 2-3. Thus, pursuant to *Matulic*, the administrative law judge applied Section 10(a) and found that claimant's average weekly wage was $1,004.37, resulting in a compensation rate of $669.38. Decision and Order at 14. He rejected employer's assertion that the presumptive use of Section 10(a) is rebutted because the calculated earnings exceed claimant's actual earnings by $12,000.[16] As the Ninth Circuit stated in *Matulic* that

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[15] It appears either claimant or the administrative law judge divided the number of hours claimant worked by 8 in order to arrive at 201.35 days. The Board has affirmed this as a rational method of arriving at the number of days worked, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). *But see Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999) (decision on recon.), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000) (dividing vacation hours by 8 to convert them to workdays is irrational because it would mean the claimant worked more than the allotted 260 days per year for a 5-day-per-week worker).

[16] Multiplying $1,004.37 by 52 weeks results in calculated earnings of over $52,000 per year, and claimant's actual annual earnings for each of the three years preceding his injury did not exceed approximately $40,000.

overcompensation alone is insufficient reason to rebut the use of Section 10(a), and as that is the only reason employer offers here, we must affirm the administrative law judge's use of Section 10(a). The instant situation, like that in *Price*, satisfies the test set forth in *Matulic* and, consequently, "falls well within the realm of theoretical or actual 'overcompensation' that Congress contemplated." *Matulic*, 154 F.3d at 1058, 32 BRBS at 152(CRT).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Betty Jean Hall
BETTY JEAN HALL
Administrative Appeals Judge

CERTIFICATE OF SERVICE

02-0783 Robert Castro v. General Construction Company, Liberty Northwest Insurance Corporation, Director, Office of Workers' Compensation Programs, Longshore Claims Association (Case No. 01-LHCA-0515) (OWCP No. 14-0129450)

I certify that the parties below were served this day.

May 13, 2003
(DATE)

/s/ S. Rimahi for
Thomas O. Shepherd, Jr.
Clerk of the Board

Nicole E. Hanousek, Esq.
Law Office of
William D. Hochberg
222 Third Avenue North
EDMONDS, WA 98020
–Certified

Robert Castro
15750 Euclid Avenue
BAINBRIDGE ISLAN, WA
98110
–Certified

Raymond H. Warns, Jr., Esq.
Holmes Weddle & Barcott, P.C.
Wells Fargo Center
999 Third Avenue
Suite 2600
SEATTLE, WA 98104
–Certified

Roger A. Levy, Esq.
Laughlin, Falbo, Levy and
Moresi, L.L.P.
39 Drumm Street
SAN FRANCISCO, CA
94111
–Certified

Peter B. Silvain, Jr., Esq.
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue,
N.W.
Suite S-4325
WASHINGTON, DC 20210
–Certified

Ms. Karen P. Staats
District Director
OWCP-Longshore and
Harbor Workers'
Programs
1111 Third Avenue
Suite 620
SEATTLE, WA 98101

Judge Richard K. Malamphy
U.S. Department of Labor
Office of Administrative Law Judges
603 Pilot House Drive
Suite 300, Commerce Plaza
NEWPORT NEWS, VA 23606

U.S. Department of Labor
Office of Department of Labor
Office of Administrative Law Judges
111 Veterans Memorial Blvd
Suite 530
METAIRIE, LA 70005

U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive – Suite 300
Newport News, VA 23606-1904

(757) 873-3099 [SEAL]
(757) 873-3634 (FAX)

Issue date: 08May2002

Case No: **2001-LHC-0515**

OWCP No: **14-129450**

In the Matter of:

ROBERT CASTRO,
Claimant,

v.

GENERAL CONSTRUCTION COMPANY/
LIBERTY NW INSURANCE COMPANY,
Employer/Carrier.

Appearances:

Nicole A. Hanousek, Esq.
For Claimant

Raymond H. Warns, Jr., Esq.
For Employer

Before: RICHARD K. MALAMPHY,
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed by Robert Castro ("Claimant") against General Construction Company ("Employer") for benefits under the Longshore and Harbor Workers' Compensation Act ("the act") as amended, 33 U.S.C. 901 *et seq.*

Claimant seeks permanent partial disability benefits based on an alleged thirty-five percent disability to his knee. In addition, Claimant seeks temporary or permanent total disability benefits[1] until the completion of his vocational rehabilitation on June 7, 2002.[2] Employer contends that Claimant was entitled only to a seventeen percent disability rating, which has been paid; that Employer has shown that suitable alternative employment was available to Claimant throughout the relevant period; and that Claimant is not entitled to benefits while enrolled in the vocational program.

A formal hearing in this case was held before me in Seattle, Washington on June 20, 2001, at which both parties were afforded a full opportunity to present evidence and argument as provided for by law and regulations. Claimant offered exhibits CX 1-21.[3] Employer offered exhibits EX 1-13. Claimant objected to EX 3, EX 12, EX 13, and EX 14. All were received into evidence over the objections (Tr. 18, 29). After the hearing, Claimant submitted CX 22, which is now received into evidence.

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[1] Claimant stated that he was seeking temporary total disability benefits pursuant to *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (193), *aff'd*, 40 F.3d 122 (5th Cir. 1992). However, because he has reached maximum medical improvement as of August 14, 2000 (Tr. 10), any benefits that are awarded after that date should be classified as permanent total disability benefits.

[2] Claimant's pre-hearing statement requests benefits until July 1, 2002, but his vocational records indicate that the program will end on June 7, 2002 (CX 5, p. 84).

[3] The following are references to the record:

CX – Claimant's exhibit

EX – Employer's exhibit

Tr. – Transcript of hearing

Claimant also requested permission to re-depose Dr. Schuster in rebuttal to Dr. Bradley's testimony. I granted the request and I now receive the deposition as CX 23.

The findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties stipulated to and I find as follows:

1. That the parties are subject to the act;
2. That Claimant suffered an injury in the course and scope of employment on November 20, 1998;
3. That the act applies to this case;
4. That Claimant has received certain periods of disability compensation which total $49,935.26;
5. That Claimant filed a timely claim for compensation;
6. That Claimant gave timely notice of injury

(Tr. 5).

ISSUES

1. What is the correct disability rating for Claimant's knee injury?
2. Is Claimant entitled to total disability compensation while enrolled in a vocational rehabilitation program?
3. What is the appropriate average weekly wage?

FINDINGS OF FACT

Claimant, who is fifty-one years old, worked as a carpenter and pile driver from 1973 until he was disabled due to his injury (Tr. 30-31). He began to work for General Construction in 1998 as a pile driver (Tr. 30). His duties included chipping concrete piles, which often required him to hold a fifty-pound jackhammer in a horizontal position (Tr. 31). On November 20, 1998, Claimant injured his right knee when he slipped on a crane step (Tr.32-3).

The next day, Claimant sought medical care at the emergency room of Swedish Hospital (Tr. 33). The following week, he saw Dr. Lance Brigham, who determined that Claimant had torn his anterior cruciate ligament (ACL) (Tr. 34). On December 30, 1998, Claimant underwent his first surgery, an ACL reconstruction with a patellar tendon graft and iliotibial band tenodesis (EX 6, pp. 11-12). This surgery involved placing screws in Claimants knee (Tr. 34). After this surgery, Claimant experienced pain and swelling, which required him to use a brace, place ice on his knee, and take pain pills (Tr. 35).

Claimant believed that he and Dr. Brigham were not communicating well regarding his treatment, and on January 27, 1999, Claimant changed his treating physician to Dr. Peter Mandt (EX 7, p. 1; Tr. 36). The screws in Claimant's legs caused problems, and they were surgically removed on March 18, 1999 at Dr. Mandt's recommendation (EX 7, p. 2; Tr. 36-7). Dr. Mandt released Claimant to work on May 10, 1999 (EX 7, pp. 6-8). Claimant returned to work from June 14, 1999 until July 13, 1999, at which time Dr. Mandt placed him on light duty (EX 14, p. 3; EX 7; p. 9).

Dr. Bruce Bradley is a board-certified orthopedic surgeon (EX 16, pp. 4-5). He examined Claimant on August 25, 1999, at the request of Employer (EX 8, p. 5). Claimant indicated that his knee was stiff and swollen. He stated that he could not squat fully due to decreased flexion (EX 8, p. 5).

Dr. Bradley examined Claimant's knee and found that it lacked 9 degrees to full extension and that it flexed to 125 degrees (EX 8, p. 3; EX 16, pp. 12-3). Claimant's thigh circumference was 16-⅛" on the right and 17-⅛" on the left (EX 8, p. 3). Dr. Bradley concluded that Claimant's right knee condition was fixed and stable and assigned a 17 percent impairment rating to the right lower extremity. Dr. Bradley attributed the impairment to the November 28, 1998 work-related accident (EX 8, p. 5). Dr. Bradley examined Claimant again on April 28, 2001, and reached substantially the same conclusion, reaffirming the 17 percent impairment rating and the work-relatedness of the injury. At that time, Dr. Bradley opined that Claimant did not need any further formal treatment (EX 10, p. 5).[4]

Upon reviewing Claimant's job description as a pile buck, Dr. Bradley concluded that Claimant could not return to his former employment. Dr. Bradley determined that Claimant should lift twenty pounds frequently and fifty pounds occasionally, squat and climb occasionally, and not crawl at all. He also stated that Claimant should have a mild unprotected height restriction (EX 16, pp. 14-5).

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[4] In his deposition, Dr, Bradley stated that he now believes that proper application of the combined values charts. would produce a rating of 10 percent (EX 8, p. 33). However, Employer has already paid a 17 percent rating and argued for a 17 percent rating at the hearing or on brief (Tr. 7, Employer/Carrier's Post-Trial Brief, p.19).

Claimant returned. to Dr. Brigham on March 21, 2000 for an independent medical evaluation. Dr. Brigham did not provide a disability rating but noted Dr. Bradley's disability rating of 17 percent. Dr. Brigham recommended further surgery and stated that this surgery would not increase Claimant's disability rating (CX 13, pp. 253-4).

On July 31, 2000, Claimant had a third surgery to increase his flexion and decrease scar tissue (Tr. 39). On August 14, 2000, Dr. Mandt indicated that Claimant's condition was fixed and stable and that he could return to light duty, indicating that he had reached the (maximum medical improvement (EX 7, p. 17; Tr. 10). Claimant attempted light duty work at General Construction, cutting metal plates with a torch while remaining seated (Tr. 40). However, the job duties proved to be too strenuous for him. The plates and torches were very heavy, and he had difficulty getting out of the way when plates were dropped. He was also unable to get onto a forklift or to "do any of the stuff that I was needed to do to get the jobs done without asking for help and people were starting to get annoyed with me" (Tr. 41). The job also required him to walk "a lot," which caused throbbing pain and swelling in his leg (Tr. 41). Dr. Mandt concluded that Claimant's job duties were not appropriate to his restrictions, and Employer did not offer any other light duty work (Tr. 42). On October 6, 2000, Dr. Mandt opined that Claimant could not return to his regular job in heavy construction and that he should pursue vocational retraining for light-duty work (EX 7, p. 18).

Dr. Gary Schuster examined Claimant on May 10, 2001, at the request of Claimant's attorneys (CX 20). Dr. Schuster is board certified in sports medicine and internal medicine. He is not an orthopedic surgeon (CX 20, p. 4).

Dr. Schuster measured Claimants knee flexion from negative 10 degrees to 126 degrees (CX 12, p. 250). Dr. Schuster measured Claimant's thigh at 12 centimeters above the knee. He found that Claimant's right knee measured at 41 centimeters and his left knee at 43 centimeters (CX 12, p. 250).

Using the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides)*, Dr. Schuster opined that Claimant's diminished range of motion in the right knee yielded a 20 percent lower extremity impairment. He found that unilateral thigh atrophy of 2.7 centimeters yielded a 12 percent lower extremity impairment. Finally, he felt that Claimant's post-surgery status represented a 7 percent lower extremity impairment. Dr. Schuster then used the combined values chart to arrive at a 35 percent permanent partial disability rating of the lower right extremity (CX 12, p. 251).

In a second deposition, Dr. Schuster testified that he has been using the *AMA Guides* to assign disability ratings several times a weeks since the 1980s (CX 23; p. 4). He. stated that the *Guides* are standardized in order that "if Dr. X looks at a patient, they can get similar results to Dr. Y in Seattle versus Miami. And you get, you know, similar reliability of findings" (CX 23, p. 5). Upon reviewing *AMA Guides* Table 17-2, "Guide to the Appropriate Combination of Evaluation Methods," Dr. Schuster admitted that he had used the chart incorrectly in rendering his rating. According to the chart, values for diminished range of motion, muscle atrophy, and diagnosis-based impairments could not be combined (CX 23, pp. 22-3). Instead of combining the values, Box 17-1 in the *AMA Guides* instructs the physician to select the largest and most clinically appropriate methods for each illness/injury" (CX

23, ex 2). In this case the largest and most appropriate rating was 20 percent for diminished range of motion. Thus, Dr. Schuster acknowledged that, if the steps set out in the *AMA Guides* were applied to the measurements that he made of Claimant, Claimant's impairment rating would be 20 percent (CX 23, pp. 24-5).

However, Dr. Schuster pointed to language stating that "the evaluator should choose the impairment using different alternatives and choose the method or combination that clinically is most useful for the individual (CX 23, p. 27). He argued that it was appropriate to combine the atrophy and range of motion ratings, stating, "It's really up to me to say this can or can't be. This is what the text allows you to do" (CX 23, p. 27). He reasoned that, since combining the impairments yielded a higher rating, the combination was appropriate to achieve an "optimal" result (CX 23, p. 27). However, he stated that he would not include the diagnosis-based estimate. Therefore, his overall rating was reduced from 35 to 30 percent lower body impairment (CX 23, p. 29).

Dr. Mandt measured Claimants range of motion at 130 degrees in October 2000 (CX 19, p. 19). However, Dr. Mandt did not assign a disability rating based on this measurement. He testified that he does not consider it appropriate to assign disability ratings to his own patients. He did not rate Claimant's injury but he considered Dr. Bradley's rating and Dr. Schuster's rating both to fall within the acceptable range (CX 19, p. 16).

2. Vocational assessment

Liberty Northwest referred Claimant to Vocational Consulting,. Inc. on September 24, 1999 (EX 3, p. 1).

Monte Ewald, a vocational rehabilitation consultant, conducted a labor-market survey. He identified identified thirteen positions that were available to Claimant. The following types of jobs were identified: alarm monitor, security guard; warehouse worker, and associate mailer (EX 3). The jobs were identified between December 28, 1999 and January 12, 2000 and paid between $8.00 and $10.00 per hour (EX 3, pp. 4-33). Claimant's treating physician, Dr. Mandt, approved the jobs (EX 3, pp. 34-9).

Kent Shafer, Employer's vocational expert, has a masters degree in rehabilitation counseling and is a principal and counselor with OSC Vocational Systems, inc. (Tr. 87). He has been performing vocational assessments and labor-market surveys in longshore cases for over eighteen years and has testified on behalf of employers and claimants (Tr. 88). Between June 2000 and April 2001, Shafer located ten jobs based on Claimants medical history, vocational skills, and educational history (EX 13, pp: 1-48). Dr. Bradley, Dr. Mandt, and Stan Owings all approved the jobs (EX 13, pp. 1-10; CX 19, pp. 28-9; CX 6, p. 172). However, Dr. Bradley stated that he only approved the security guard and night monitor positions on the condition that Claimant would not be required to physically confront or restrain anyone (EX 16, p. 67).

Most of the job's in Employers survey paid between $8.00 and $10.00 per hour, or between $16,640 and $20,800 over an eight-hour day in a 260-weekday year. Shafer indicated that the jobs have the potential with experience to pay Claimant around $25,000 per year, but he did not identify specific "experienced" positions or assess their availability to Claimant (EX 13, p. 14). Information from the Bureau of Labor Statistics indicates that hotel/motel managers in Washington state make an

average of $26,280 per year, $27,580 in the Seattle area (EX 13, p. 14; CX 6, p. 173).

Shafer identified the following specific jobs: courier, cashier, night monitor, bench assembler, security officer, and production worker (EX 13, p. 15). At the hearing, Shafer testified that there is great demand for the jobs that he identified and that similar positions are always available in the Seattle labor market (Tr. 91, 101, 110).

Shafer stated that the function of most security guards is "simply [to] provide a presence." He referred to recent litigation in the area that occurred when a security officer chased and killed a suspect, stating that officers are generally prohibited from taking such action. Officers would stay in the lobby and periodically patrol the floor, functioning as a "walking monitor . . . interspersed with sitting between rounds." If a break-in or other security incident occurred, the officer would be expected to call the police. Security guards generally carry walkie talkies, and if the employee was "doing his job," Shafer could not foresee a situation in which the guard would not be able to contact the police for assistance (Tr. 93, 103).

Shafer testified that he believed Claimant could work nights while enrolled in school. However, he was not aware of Claimant's class schedule and was not aware until the hearing that attending school required Claimant to make a substantial commute (Tr. 109). Shafer stated that in the "ideal" situation, a student would not have to work while in school but that it was common for students to do so. He acknowledged that because of cognitive capacity and travel requirements, some people were not able to work while enrolled in school (Tr. 109). Shafer likes to meet with the individuals whose vocational status he is

assessing, but he was not able to meet with Claimant. He has not met with Ms. Williams, Dr. Mandt, or Dr. Bradley either (Tr. 96).

Claimant testified that he received labor-market surveys from Shafer (Tr. 48). Claimant followed up on the information in at least some cases, but he found that some of the jobs were taken (Tr. 49). In other situations, it would not have been worth taking the jobs because the commute was so far. He testified that "it didn't make sense to take a job that far out, because when I pay for the ferry and parking and commuting and everything, I would have wound up making two bucks an hour" (Tr. 49).

The OWCP referred Claimant to vocational counselor Carol Williams for OWCP sponsored vocational rehabilitation (CX 4 p. 73). Williams is a certified vocational counselor, certified mental health counselor in the state of Washington, and a certified case manager with the Commission on Rehab Counselor Certification and has Case Manager Certification. She is also a registered nurse with a four year degree in nursing and a public health certificate (CX 21, p. 5). She has been assisting injured workers since 1980. She recommends vocational retraining for some clients, but she has concluded that other clients did not need retraining (CX 21, p. 7). Williams followed her standard procedure with Claimant's case file, assessing his entire medical history, social and financial issues, vocational and educational training, work history and family social background (CX 21, p. 8). Her first meeting with Claimant took one and one-half hours. Dr. Mandt, Claimant's treating physician, was present (CX 21, p. 8).

Williams concluded that Claimant would benefit from vocational retraining. She noted that he was highly

motivated to return to the workforce and was anxious to find a job that would have the potential for increased earnings in the future. She also took into account the fact that the Claimant had attempted to return to construction in a light-duty capacity and had been unable to do so. Because Claimant's only training was in construction and he had no other work history, Williams concluded that vocational retraining was appropriate (CX 21, p. 18). Williams and Claimant considered rehabilitation options and chose hotel management by a "process of elimination (CX 21, pp. 19-20). Development of Claimant's plan began on August 13, 1999. With a few short interruptions, development and training of his vocational plans has continued and is projected to continue until June 7, 2002 (CX 5, p. 84).

Claimant enrolled in a hotel management program through Highline Community College (CX 4, p. 80). Claimant lives on Bainbridge Island and must take a ferry and a bus to get to school. His total commute takes "anywhere from two and a quarter hours to an hour and a half" each way (Tr. 80). He spends fifteen to eighteen hours per week in class and approximately twenty-five hours per week in study and preparation for his classes (Tr. 80). Claimant feels that he is "kind of slow" and needs to spend a good deal of time studying (Tr. 81).

Vocational Rehabilitation Services estimated that after completing the program Claimant could earn approximately $16,000 per year at entry level (CX 6, p. 172). However, as he gained experience in the field, he could expect to earn an average wage of $27,580 per year in the Seattle area (CX 6, p. 173). Williams testified that the "ultimate training goal" of the program was to attain assistant manager and manager positions, which would

pay between $30,000 and $40,000 per year at larger hotels (CX 21, p. 35).

The hotel management program includes an internship, which may be paid. However, Claimant stated that paid internships are "very rare." He was hired for a paid internship but he was not able to keep it. In order to complete the objectives for his program, Claimant had to resign the paid internship. He worked a total of eighty hours in the paid internship. He was supposed to be paid $7.75 per hour, but at the time of the hearing he had been paid (Tr. 46).

Williams did not agree with the labor market survey provided by Shafer. She noted. that Claimant's manual dexterity was limited by a previous hand surgery, which made it difficult to bend several of his fingers (CX 48). Reviewing the positions, Williams explained:

> The cashier position was a temporary placement service and required frequent manual dexterity. The courier position was not an open position and required climbing steps, stairs. The bench assembly required manual dexterity. The cashier positions are unskilled positions and are generally part time and they tend to hire young people. The assembly positions require prolonged standing or prolonged sitting.

(CX 21, pp. 21-3).

Williams opined that Claimant "would have a great deal of difficulty" going to school and working at the same time. She stated that Claimant's intellectual abilities are such that he has to study longer than some other people have to study to accomplish the same goals (CX 21, p. 25). Furthermore, she testified that it would be difficult for Claimant to find a job that because of the length of his

commute and the need to accommodate his class and study schedule (CX 21, p. 25).

Williams retired at the end of 2000 and on January 29, 2001, Claimant began to see a new vocational consultant, Stan Owings. Owings concluded that Claimant was limited to jobs that required sedentary or light levels of physical exertion. Owings opined that the physically appropriate jobs available to Claimant based on his work and educational history were the lower skilled positions in the labor-force. Owings stated that the jobs identified by Shafer are "reasonable examples of jobs and wages currently available to Claimant" (CX 6, p. 172). Mr. Owings also recognizes that Claimant "may return to work with or without completing the educational curriculum in which he is currently enrolled" (CX 6, p. 175).

Claimant earned $38,422.57 in 1995, $38,571.33 in 1996 $39,648.34 in 1997, and $39,717.62 in 1998 (CX 2). Employer initially paid compensation to Claimant based on an average weekly wage of $988.62 (CX 1, p.10). However, on July 3, 2000 Employer wrote a memo indicating that the average weekly wage had been adjusted to $500.00 because Claimant had "not produced requested evidence of any earnings to supplement the $9,886.18 earned at General Construction Company in the 52 weeks prior to the injury" (CX 1, p.11). On July 11, 2000, Employer reinstated compensation based on the "recalculated" average weekly wage of $756.65 (CX 1, p. 13).

Claimant argued that his average weekly wage should actually be $1006.60 (EX 15). In support of his motion for partial summary judgment, Claimant signed a declaration stating that he worked the following hours in 52 weeks prior to his accident:

1997	MKB Construction	181 hours/22.6 days	$ 4,108
1998	MKB Construction	994 hours/124.25 days	$ 25,484
1998	General Construction	436 hours/54.5 days	$ 10,874
total		1,611 hrs/201.35 days	$ 40,466

These data are supported by wage records submitted by Claimant (CX 2, CX 3). The records also indicate that, in most of the weeks that Claimant worked, he worked forty hours (CX 3).

DISCUSSION

I. Disability Rating

The parties agreed that Claimant suffered a permanent partial disability to his right lower extremity. However, they disagreed about the level of the impairment. Claimant argued, based on Dr. Schuster's opinion, that he suffered a 35 percent impairment of the lower extremity. Employer favored Dr. Bradley's 17 percent rating. Neither Dr. Mandt nor Dr. Brigham gave Claimant an impairment rating, but Dr. Mandt stated that both ratings were within the acceptable range.

After reviewing the testimony and medical records of Dr. Bradley and Dr. Schuster, I find Dr. Bradley to be more credible. Dr. Bradley is a board-certified orthopedist. He examined Claimant twice, on August 25, 1999 and on April 28, 2001 (EX 8, p. 5; EX 10, p. 5). He obtained similar results on both occasions. In his deposition, he gave a detailed explanation of the measurements that he took and the manner in which he applied the formula of the *AMA Guides*. He stated that, if anything, he had overestimated the level of Claimants impairment but that he gave

Claimant "the benefit of the doubt" in assigning a 17 percent rating (EX 8, p. 33).

Dr. Schuster is board-certified in sports medicine and is also qualified to assign disability ratings (CX 20, p. 4). In fact, he testified that he has been rating patients for over ten years (CX 23, p. 4). He testified that he favored the *AMA Guides* because they help to ensure consistency in ratings (CX 23, p. 5). However, after reviewing the *Guides*. He admitted that he had incorrectly combined impairment ratings based on diagnosis, diminished range of motion, and muscle atrophy. He stated that if he had followed the stated criteria, the maximum impairment rating would be 20 percent (CX 23, pp. 24-5).[5]

Nevertheless, Dr. Schuster arbitrarily chose to disregard the instructions in the *Guides* regarding the combination of various impairment ratings (CX 23, p. 29). He attempted to justify this choice by referring to his discretion to choose the most clinically appropriate rating. However, he did not explain why his departure from the *Guides* was clinically appropriate (CX 23, pp. 25-9). His arbitrary departure from the *Guides* rendered his opinion internally inconsistent. He claimed expertise based on his extensive experience in applying the *Guides*. He praised the *Guides* for creating consistency among ratings by different doctors. However, his testimony in this case showed that misapplied the *Guides* and disregarded them

[5] I note that Dr. Schuster's misreading of table 17-2 was quite blatant. He repeatedly stated that the table said that the three types of ratings could be combined, when even a cursory examination shows that this is not the case (CX 23, ex. 2). However, it required extensive colloquy with Claimant's attorney before Dr. Schuster would admit this obvious fact (CX 23, p. 18).

when he found them to be inconvenient. While strict application of the *Guides* is not a legal requirement, a doctor's opinion must be well-reasoned in order to be persuasive. Dr. Schuster's inconsistent testimony regarding application of the *AMA Guides* renders his entire opinion suspect. Therefore, I credit Dr. Bradley's well-reasoned opinion over that of Dr. Schuster and accept Employer's contention that a 17 percent disability rating is correct. Therefore, Claimant should have received-disability payments for 17 percent of 288 weeks, or 48.96 weeks. 33 U.S.C. 908(c)(3).

II. Permanent Total Disability Compensation

Where a claimant has sustained an injury that falls under the schedule, the claimant is limited to a recovery for an award according to the provisions of the schedule absent a showing of total disability. Paying partial disability benefits based on a mere loss of wage-earning capacity that is less than the total loss of wage-earning capacity would run contrary to the controlling authority in *Potomac Electric Power Co. v. Director. OWCP [Pepco]*, 449 U.S. 268, 277; 14 BRBS 363 (1980). The Benefits Review Board ("the Board") has held that unless a worker is totally disabled he is limited to the compensation provided by the appropriate schedule provision. *Winston v. Ingalls Shipbuilding*, 16 BRBS 168, 172 (1984).

Because Claimant was paid a scheduled rating for his leg, additional, compensation can only be paid if no suitable alternative employment is available. Employer has shown that numerous jobs were available to Claimant. Employers' two vocational experts, Monte Ewald and Kent Shafer, identified twenty-three available jobs in a variety

of fields. All of these jobs were approved by Dr. Bradley[6], treating physician Dr. Mandt, or both. Stan Owings, one of the vocational experts retained by Claimant, also agreed that Claimant was capable of returning to work and had an earning capacity whether or not he completed vocational retraining (CX 6, p. 175).

Only one of Claimant's experts, Carol Williams, argued that Employer had not shown suitable alternative employment.[7] Williams believed that some of the jobs were inappropriate because Claimant's dexterity was limited by a prior hand surgery. However, no physician indicated that Claimant suffered any limitation due to hand surgery.[8] Williams' generalization that employers favor younger workers for cashier positions is unsupported, and was not shared by the three other vocational experts who testified. Her statement that cashier positions would only be available part time is irrelevant as Employer need not show that Claimant could work full-time, only that he had some wage-earning capacity. Finally, her opinion that the assembly jobs required too much walking and standing

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[6] Dr. Bradley felt that security positions were inappropriate if Claimant would have to apprehend anyone, but Shafer's testimony and the specific job descriptions indicated that he would not.

[7] Nowhere in his pre-hearing statement, oral argument or brief did Claimant argue that Employer had not shown suitable alternative employment. However, Employer must show suitable alternative employment before *Abbott* is relevant. The issue was not stipulated and, because Williams made the strongest argument that Employer had not met this element of the case, I address her argument to ensure that all elements of the case are met.

[8] Williams is a registered nurse, not a physician. Furthermore, there is no indication that she examined Claimant physically or employed her medical expertise in any way in her evaluation of his capabilities.

was not shared by the physicians who approved the job descriptions. I conclude that Employer has shown suitable alternative employment and that Claimant retains some earning capacity.

However, Claimant argues that, pursuant to *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993), he is entitled to total disability compensation enrolled in a vocational rehabilitation program. I agree. in *Brown v. National Steel and Shipbuilding*, 34 BRBS 195 (2001), the Board applied *Abbott* to a case arising under the law of the Ninth Circuit Court of Appeals, citing the Ninth Circuit's statement that one goal of the act was to further the rehabilitation of injured workers. *Brown* at 197, *Stevens v. Director, OWCP*, 909 F.2d 1256, 1260; 23 BRBS 89, 95 (CRT). In *Brown*, the Board held. that a claimant could receive total disability while enrolled in vocational retraining even of he had already received a scheduled award. *Brown* at 198.

Abbott does not apply to every case in which the claimant is enrolled in vocational rehabilitation. In *Kee v. Newport News Shipbuilding and Dry Dock Company*, 33 BRBS 221 (2000), the Board clarified that *Abbott* placed the burden on the claimant to prove that he is unable to perform suitable alternative employment due to his enrollment in vocational training. *Kee*, 33 BRBS, at 223. Claimant need not show that he was contractually precluded from working, only that he diligently sought but was unable to obtain suitable alternative employment that was compatible with his vocational rehabilitation. *Kee*, at 223.

The Board has stated that in applying *Abbott* the finder of fact should consider whether employer agreed to

the rehabilitation plan and continuing payment of benefits, whether the claimant's enrollment precluded employment, whether completion of the program would benefit the claimant by increasing wage-earning capacity, whether the claimant shows full diligence in completing the program, and other relevant factors. *Gregory v. Norfolk Shipbuilding and Dry Dock Company*, 32 BRBS 264, 266 (1998). In *Bush v. I.T.O. Corporation*, 32 BRBS 213 (1998), the Board found in favor of Claimant even though he had a college degree and had a capacity to earn more than minimum wage during rehabilitation. The Board emphasized that Claimant was not pursuing "a mere personal choice" but a program that his counselor had found would maximize his skills and minimize employer's liability. *Bush* at 219.

In the instant case, Employer has not approved the rehabilitation program. Although this is relevant, it cannot be the dispositive factor because such a decision would allow employers to veto an otherwise legitimate training program.

Furthermore, Claimant has shown that his enrollment effectively precluded other employment. He testified that he spent between three and four and a half hours per day commuting, twenty-five hours studying, and fifteen to eighteen hours in class, a total of between forty-six and fifty-four hours (Tr. 80). Both the length of his commute and its unpredictability are factors that would make it difficult to obtain outside employment. Carol Williams opined that Claimant's intellectual capacity as well as the long commute would cause him "a great deal of difficulty" in combining school with a job (CX 21, p. 25). Kent Shafer acknowledged that travel requirements combined with cognitive capacity could prevent some people from working

while in school (Tr. 109). He opined that Claimant could work while in school, but he was not aware of the length of Claimant's commute or Claimants class schedule. Shafer never met with Claimant and therefore had less opportunity to assess his cognitive abilities than did Williams; who met with Claimant regularly (Tr. 96, CX 4).

Nevertheless, Claimant did attempt to secure employment. He worked briefly in a paid internship but was unable to continue due to his vocational program (Tr. 46).[9] He also investigated at least some of the jobs that Shafer identified but found either that they were unavailable or that the required commute rendered them impractical (Tr. 48-9). Furthermore, Claimant entered vocational rehabilitation only after attempting to return to his original employment. He was not pursuing a "mere personal preference" in studying hotel management. Rather, the job was chosen by "a process of elimination (CX 21, pp. 19-20). Although Claimant at times expressed concerns about falling behind in school, his vocational records indicate that he has been enrolled in the program without significant interruption since 1999 and is on track to finish his education in June 2002 (CX 5, p. 84).

I find that Claimant and his vocational advisors reasonably determined that being trained in hotel management gave Claimant the best long-term earning potential. Starting wages in the hotel industry were in a range comparable to the jobs indicated by employer (CX 6,

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[9] Although Employer presents the fact that Claimant briefly obtained a paid internship as evidence of his earning capacity, I view his unrebutted testimony that he was unable to keep the internship while enrolled in school as stronger evidence to the contrary (Tr. 46).

p. 172; EX 13).[10] With experience, however, statistical data indicated that average annual wages in the hotel industry in the Seattle area would be $27,580, while Employer estimated that the jobs it found would pay approximately $25,000 annually with experience (CX 6, p. 173).[11] As a manager at a larger hotel, Williams estimated that Claimant could earn between $30,000 and $40,000 annually (CX 12, p. 35). Employer argues that the training is not necessary because Claimant could obtain an entry-level position at a hotel without training, However, I find it reasonable to conclude that completing the training program would give Claimant greater potential to achieve a higher-paying management job. I find that Claimant is entitled to permanent total disability benefits pursuant to *Abbott* until June 7, 2002.

III. Average Weekly Wage

Claimant argues that his average weekly wage should be calculated under section 10(a) of the act, white Employer argues that it should be calculated under section

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[10] Most of the job's in Employer's survey paid between $8.00 and $10.00 per hour, or between $16,640 and $20,800 over an eight-hour day in a 260-weekday year (EX 13). Claimant's experts estimated a starting wage in the hotel industry at approximately $16,000 per year (CX 6, p.172).

[11] In fact, Employer did not provide information about the availability of or Claimants suitability for jobs that Claimant could find "with experience" outside the hotel field; however, assuming arguendo that Employer's figure is correct, it is still lower than the average wage for an experienced hotel employee in the Seattle area (EX 13, p. 14; CX 6, p. 173).

10(c). 33 U.S.C. 910(a), (c).[12] In *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir. 1998), the Ninth Circuit stated that section 10(a) is presumptively the correct formula under which to calculate average weekly wage. *Matulic* at 1057. The *Matulic* court stated that "[t]he statute sets a high threshold and requires the application of 910(a) or 910(b) except in unusual circumstances." *Id.* The court acknowledged that application of 910(a) will create a certain amount of overcompensation because "virtually no one in the country works every working day of every work week." *Id.*, *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982). The court further reasoned that the point at which the disparity between the claimant's actual days worked and the 260-day standard that the statute sets for 5-day workers becomes unreasonable or unfair is "a question of line-drawing."

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[12] Section 10(a) reads:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

Section 10(c) reads:

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

Matulic at 1058, *Duncanson-Harrelson* at 1343; 33 U.S.C. 910(a). Following *Duncanson-Harrelson*, the *Matulic* court concluded that when a claimant works more than 75% of the workdays of the measuring year, the presumption is that 910(a) applies. *Matulic* at 1058.

In the instant case Claimant a five-day worker, worked 1,611 hours or 201.35 days in the measuring year (CX 2, CX 3). Therefore, he worked 77.4% of the 260 days which constitute a standard year under the act. 33 U.S.C. 910(a). Pursuant to *Matulic*, his average weekly wage should be calculated under section 10(a).

Employer argues that additional evidence may overcome the presumption that section 10(a) applies. Employer attempts to distinguish the instant case from *Matulic* on the basis that Claimant has never earned the type of wages at which he would be compensated under section 10(a). However, this distinction is irrelevant Although the *Matulic* court noted that Matulic's historic earnings were higher than the measuring year would indicate, the court specifically stated it did not rely on this fact. *Matulic* at 1058. The holding was based entirely on the fact that the claimant worked more than 75% of the days in the measuring year, and the same circumstances obtain here.[13]

Under section 10(a), the average, weekly wage of a five-day worker is calculated by multiplying the Claimants average daily wage by two hundred sixty and then dividing by fifty-two. 33 U.S.C. 910(a), (d)(1). In the measuring

[13] This is not to say that the presumption that section 10(a) applies is irrebuttable, simply that the evidence proffered by Employer does not rebut it.

year, Claimant earned $40,466 and worked 201.35 days. Therefore:

Average weekly wage: $40,446/201.35 X 260/52 = $1004.37
Compensation rate: $1004.37 X 2/3 = $669.58

ORDER

It is hereby ORDERED that

1. Employer shall pay Claimant permanent partial disability compensation for a scheduled injury to his right knee based on a 17 percent lower extremity disability rating and an average weekly wage of $669.58 over 48.96 weeks, a total of $32,782.64.

2. Employer shall pay out temporary total disability benefits from July 14, 1999 until August 13, 2000 and permanent total disability benefits from August 14, 2000 until June 7, 2002. Payments of temporary total disability and temporary partial disability prior to July 13, 1999 remain in effect.

3. Employer shall pay interest at the treasury-bill rate specified in 28 U.S.C. 1961 in effect when this decision and order is filed with the Office of the District Director on all accrued unpaid benefits, if any, computed from the date on which each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).

4. Employer shall receive credit for any benefits previously paid to Claimant. No penalty shall be assessed until ten days after the employer is notified of the amount to be paid.

5. Employer shall continue to furnish such reasonable, appropriate, and necessary medical care for Claimants work-related injury pursuant to section 7 of the act.

6. Within thirty days of receipt of this decision and order, Claimants attorney shall file a copy of a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have twenty days to respond thereto.

/s/ RK Malamphy
RICHARD K MALAMPHY
Administrative Law Judge

RKM/cmp
Newport News, Virginia

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENERAL CONSTRUCTION COMPANY; LIBERTY NORTHWEST INSURANCE CORP., Petitioners, v. ROBERT CASTRO; DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, Respondents.	No. 03-72528 OWCP No. 14-129-450 BRB No. 02-0783 **ORDER** (Filed May 20, 2005)

BEFORE: T.G. NELSON and RAWLINSON, Circuit Judges, and SCHWARZER,* Senior District Judge

Judge Rawlinson has voted to deny petitioners' petition for rehearing and rejects the suggestion for rehearing en banc; Judge T. G. Nelson and Judge Schwarzer have voted to deny the petition for rehearing and recommend rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

33 U.S.C. Sections 908(c)(1)-(20)

908. Compensation for disability

Compensation for disability shall be paid to the employee as follows:

. . .

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two-hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 12 of this Act [33 USC § 912], or a claim for compensation, under section 13 of this Act [33 USC § 913], shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the

entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $ 7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

33 U.S.C. Section 908(c)(21)

908. Compensation for disability

Compensation for disability shall be paid to the employee as follows:

. . .

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

. . .

(21) Other cases: In all other cases in the class of disability, the compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. Section 908(h)

908. Compensation for disability

. . .

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. Section 910(a) & (c)

§ 910. Determination of pay

Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

. . .

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

20 C.F.R. § 701.301 Definitions and use of terms.

(a) As used in this subchapter, except where the context clearly indicates otherwise:

. . .

(7) *District Director* means a person appointed as provided in sections 39 and 40 of the LHWCA or his or her designee, authorized by the Director to perform functions with respect to the processing and determination of claims for compensation under such Act and its extensions as provided therein and under this subchapter. These regulations substitute this term for the term *Deputy Commissioner* which is used in the statute. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute.

2

No. 05-371

In the Supreme Court of the United States

GENERAL CONSTRUCTION CO., ET AL.,
PETITIONERS

v.

ROBERT CASTRO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Solicitor of Labor
NATHANIEL I. SPILLER
Assistant Deputy Solicitor
EDWARD D. SIEGER
ADAM NEUFELD
Attorneys
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether a claimant's average annual earnings used to determine his compensation rate under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, should be computed under 33 U.S.C. 910(a), rather than under 33 U.S.C. 910(c), when the claimant worked more than 75% of the workdays available for a five-day worker, the employment in which he worked was not seasonal, and there is no practical difficulty in applying Section 910(a).

2. Whether a worker who suffers an injury falling under the LHWCA's schedule for permanent partial disability benefits in 33 U.S.C. 908(c) may receive total disability benefits while participating in a vocational rehabilitation program approved by the Department of Labor's Office of Workers' Compensation Programs when such participation precludes otherwise suitable alternative employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 401 F. 3d 963. The decision of the Benefits Review Board (Pet. App. 32-62) is reported at 37 Ben. Rev. Bd. Serv. 65. The decision of the administrative law judge (Pet. App. 63-88) is reported at 36 Ben. Rev. Bd. Serv. 407.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2005. A petition for rehearing was denied on May 20, 2005 (Pet. App. 89-90). On July 21, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including Septem-

ber 17, 2005, and the petition was filed on September 19, 2005 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires covered employers to provide compensation for disability or death resulting from work-related injuries of covered employees. 33 U.S.C. 904, 908. The statute establishes four categories of disability benefits, distinguished by the degree of the disability (total or partial) and by its duration (permanent or temporary). 33 U.S.C. 908(a)-(c) and (e); *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 273-274 (1980).

In general, disability means an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). To determine whether a claimant is totally disabled under that definition, courts apply a burden-shifting test. See *Bunge Corp.* v. *Carlisle*, 227 F.3d 934, 941 (7th Cir. 2000); *Norfolk Shipbuilding & Drydock Corp.* v. *Hord*, 193 F.3d 797, 800 (4th Cir. 1999); *Crum* v. *General Adjustment Bureau*, 738 F.2d 474, 479 (D.C. Cir. 1984). Under that test, an injured employee who cannot return to his or her usual work establishes a *prima facie* case of total disability. Pet. App. 10. The employer must then demonstrate the availability of suitable alternative employment. *Ibid.* If the employer makes that showing, the claimant may nonetheless be entitled to total disability benefits if the claimant is unable to secure such employment. *Ibid.*

Three courts of appeals have concluded that employees who are receiving vocational rehabilitation services under the direction of the Secretary of Labor, see 33 U.S.C. 939(c)(1) and (2), may be entitled to a total disability award. Pet. App. 10-15; *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 315 F.3d 286, 292-296 (4th Cir. 2002); *Louisiana Ins. Guar. Ass'n* v. *Abbott*, 40 F.3d 122, 127-128 (5th Cir. 1994). Depending on the facts of a particular case, participation in a vocational rehabilitation program may render a claimant unavailable to accept otherwise alternative employment. Pet. App. 11, 37; *Newport News*, 315 F.3d at 293-295; *Abbott*, 40 F.3d at 127-128.

An employee who suffers a work-related injury that falls under a "schedule" set forth in 33 U.S.C. 908(c)(1)-(20) is entitled to compensation for permanent partial disability whether or not his or her earning capacity has actually been impaired. *Potomac Elec.*, 449 U.S. at 269. An employee with such a "scheduled" injury can recover compensation for permanent partial disability only under the "schedule." *Id.* at 270-271. A scheduled injury can also give rise to an award for permanent total disability under 33 U.S.C. 908(a). 449 U.S. at 277 n.17. "[S]ince the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant." *Id.* at 278 n.17.

b. Under the LHWCA, the basis for computing compensation is "the average weekly wage of the injured employee at the time of injury." 33 U.S.C. 910. "[A]verage weekly wage[]" is defined as "one fifty-second part of [the employee's] average annual earnings." 33 U.S.C. 910(d)(1).

There are three methods for determining an employee's average annual earnings. First, if the injured employee worked in the same employment in which he was injured "during substantially the whole of the year immediately preceding [the] injury," average annual earnings are determined by multiplying the claimant's average daily wage during that period by 300, in the case of a six-day worker, or 260, in the case of a five-day worker. 33 U.S.C. 910(a). Second, if the employee did not work in such employment during substantially the whole of the prior year, the same calculation is employed using the average daily wage of an employee of the same class engaged during the same period in the same or similar employment. 33 U.S.C. 910(b). Third, "[i]f either of the foregoing methods * * * cannot reasonably and fairly be applied," an employee's average annual earnings is the sum that "reasonably represent[s] the annual earning capacity of the injured employee," taking into account the claimant's previous earnings and the earnings of other employees in similar employment. 33 U.S.C. 910(c).

2. Respondent Roberto Castro injured his right knee in 1998 while employed as a pile driver by petitioner General Construction. Pet. App. 4, 33, 65. That type of injury is listed under the "schedule" in 33 U.S.C. 908(c). Pet. App. 7, 34-35, 77-79. After Castro underwent three reconstructive knee surgeries and attempted unsuccessfully to return to work at General Construction, his physician recommended vocational retraining. *Id. at* 4, 33-34, 66, 68. The Department of Labor's Office of Workers' Compensation Programs approved a vocational rehabilitation program under which Castro attended hotel management classes. *Id.* at 2, 5, 34, 64, 74. Castro filed a LHWCA claim seeking total disability compensation

for the period during which he was enrolled in the vocational rehabilitation program. *Id.* at 2, 34, 64. General Construction and its insurer, petitioner Liberty Northwest Insurance Corp., disputed Castro's entitlement to total disability compensation for the vocational rehabilitation period and argued that his average weekly wage should be computed under 33 U.S.C. 910(c) rather than 33 U.S.C. 910(a). *Id.* at 8, 64, 84-85.

3. An administrative law judge (ALJ) awarded permanent total disability compensation for the period during which Castro attended vocational training. Pet. App. 79-84. The ALJ reasoned that, because Castro's knee injury fell within the Section 908(c) "schedule," Castro had to establish a right to total disability compensation in order to avoid the limitations of the "schedule" for permanent partial disabilities. *Id.* at 79. The ALJ concluded that Castro was unable to return to his usual work. *Id.* at 35, 67-68, 74. The ALJ further found that he retained some wage-earning capacity because petitioners showed that Castro was capable of returning to work in a number of suitable alternative jobs. *Id.* at 79-81. The ALJ awarded compensation for total disability, however, because Castro showed that he could not perform such work while enrolled in vocational training. *Id.* at 81-82. The ALJ also found that Castro's long-term earning potential would be greater after completing the program. *Id.* at 83.

In calculating Castro's average weekly wage for purposes of setting compensation, the ALJ concluded that, under Ninth Circuit precedent, when a claimant works more than 75% of the work days in the measuring year, 33 U.S.C. 910(a) presumptively applies. Pet. App. 84-86. Castro worked 77.4% of the applicable work days and petitioners could not rebut the presumption, the ALJ

concluded, by arguing only that Castro had never actually earned the type of wages at which he would be compensated under 33 U.S.C. 910(a). Pet App. 86. The ALJ accordingly awarded compensation based on an average weekly wage of $1004.37, *id.* at 87, rather than the $756.65 for which petitioners argued. *Id.* at 6, 36.

4. The Benefits Review Board (Board) affirmed the ALJ's award of benefits. Pet. App. 32-62. The Board reasoned that, under the burden-shifting test that courts use in determining total disability, an injured claimant may establish entitlement to total disability compensation for periods during which he or she is enrolled in a vocational rehabilitation program. *Id.* at 42-43. The Board also concluded that the ALJ properly applied that test in this case. *Id.* at 46-50.

The Board also affirmed the ALJ's use of 33 U.S.C. 910(a) to calculate the average weekly wage. Pet. App. 55-60. The Board agreed with the ALJ that petitioners could not rebut the presumptive use of Section 910(a) solely by arguing that its use overcompensated Castro. *Id.* at 59-60.

5. The court of appeals affirmed the Board's decision. Pet. App. 1-31. The court agreed with the Fourth and Fifth Circuits that the LHWCA permits an award of total disability benefits during a period of vocational rehabilitation. *Id.* at 13-15; see *Newport News*, 315 F.3d at 292-293; *Abbott*, 40 F.3d at 127-128. The court rejected petitioners' arguments for denying compensation, including an argument that this Court's decision in *Potomac Electric* precludes an award. Pet. App. 15-20. The court of appeals explained that, in *Potomac Electric*, the Court held that when a claimant is entitled to partial disability benefits for a scheduled injury, those benefits are the claimant's exclusive remedy and the claimant

cannot recover partial disability benefits based on loss of wage-earning capacity. *Id.* at 19. The court of appeals concluded that *Potomac Electric* does not address or preclude a claim for *total* disability, the kind of award at issue here. *Id.* at 20.

The court of appeals also upheld the use of 33 U.S.C. 910(a), rather than Section 910(c), to calculate the average weekly wage. Pet. App. 20-27. The court explained that under its earlier decision in *Matulic* v. *Director, OWCP*, 154 F.3d 1052, 1058 (9th Cir. 1998), Section 910(a) "presumptively applies when a claimant works more than 75% of the workdays of the measuring year." Pet. App. 22 (internal quotation marks omitted). The court rejected petitioners' argument that Section 910(a) should not apply because it would lead to overcompensation. *Id.* at 23-24. "Given the virtual inevitability of overcompensation under [Section 910(a)]," the court "decline[d] to interpret the existence of [Section 910(c)] as a statutory bar to any application of the LHWCA resulting in arguable overcompensation." *Id.* at 24.

ARGUMENT

1. Petitioners contend (Pet. 9) that the court of appeals erred in adopting a rule that requires the application of Section 910(a) when an employee worked at least 75% of the workdays available for a five-day worker in the year prior to the injury. The Court recently denied a petition for a writ of certiorari in a case raising the same issue, see *Stevedoring Servs. of Am.* v. *Price*, 382 F.3d 878, 883-885 (9th Cir. 2004), cert. denied, 125 S. Ct. 1724 (2005), and there is no reason for a different outcome here.

a. Petitioners contend (Pet. 10, 12 n.6) that the court of appeals' decision imposes a rigid bright-line rule that